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THE CODE OF CANON LAW. 1918-1943

THE twenty-fifth anniversary of a universally significant event in the history of law will be observed on May 19, 1943. Twenty-five years previously THE CODE OF CANON LAW went into effect. Only posterity will be competent adequately to evaluate the proportional relation in juridical influence borne by this Code to other great Codes of a more distant past. Its preeminence in the ecclesiastical sphere easily surpasses the best that the tradition had previously produced. In method, cohesion, and comprehensiveness; in its adjustments to the present of the best in previous law; in its conciliation of the claims of the numerous personal and territorial elements subject to juridical cognizance; in its wise clauses guaranteeing elasticity and flexibility to the processes of application, dispensation, and amendment; in its realistic recognition of coordinate systems and even adoption of their laws; perhaps most of all in the simplicity and frugality of its text; in these qualities, to mention only the more obvious, it easily outstrips the best ecclesiastical Codes of the past.

But its greatness can not be measured without due attention to its heritage. Without the wealth of jurisprudence that was its legacy, it could easily have been

something even pitiful in uncouthness, inadequacy, and naivete. Instead of a Code, it might have been a handbook. That it stands with the best of its class is due to the learning of its creators; that they were learned is due to the scholarship of their colleagues in the past.

That heritage must be traced beyond the systematic to the chronological codes and to the scholars whose diligence arranged in chronological order the acts of Popes and Councils; to Denys the Little (died between 526 and 555), dressing the canons of the East in the language of the West and Pope Adrian (772-795) who made them available to Charlemagne and the French Church (802). It arises from the writings of the Fathers whose theology could not escape acquaintance with the law and from the flowering of the schools in which law merited special study of its own. It was notably enhanced by the methodical collectors whose multiple effort reached its greatest stature in the *Decretum* of Gratian (between 1139 and 1151) and by the subsequent compilers whose labors were climaxed by the achievement of St. Raymond of Penyafort, the five books of Pope Gregory IX's *Decretals* (1239). It grew apace in the admission of new members of the *Corpus Iuris Canonici*, the authentic *Liber Sextus* (1298) and Clementine Decretals (1317), and the two private collections of unattached Decretals (c. 1500). It was refined by the purifying Tridentine synthesis and polished by the clarifying acts of the Council of interpretation. It expanded anew in the private collections of papal decrees (*Bullaria*), in Pope Benedict XIV's authentic collection of his own, and in the collections of responses of the Sacred Congregations.

But as even the most illustrious of ancestry needs adjustment to its scene, so did the antecedents of the Code. It was a crying need, imperative if the sublime was not to become the ridiculous. A knight borne down with armor was walking amidst the bourgeoisie and the proletariat. Molting was decidedly in order. The trustees of the law's renown grew more restless as the years rolled on and their clamors united in a veritable peal of thunderous complaint in the letters of the hierarchy at the Council of the Vatican. Revolution intervened to impose necessary distractions in the direction of public law, and the internal renovation of discipline remained practically but a cherished hope through two long papal regimes. The penal system, indeed, soon felt the knife of Pius IX in the Constitution, *Apostolicae Sedis* (October 12, 1869), and the reorganization of the laws governing censorship and religious congregations was proclaimed by Leo XIII in his Constitutions, *Officiorum* (January 25, 1897) and *Conditae a Christo* (December 8, 1900) respectively.

It remained for Pius X, in his Motu proprio, *Arduum sane* (March 19, 1904), to authorize the long anticipated purgation and rehabilitation. This he did effectively by the establishment of the Pontifical Commission of Cardinals charged with the fulfillment of the project, under the Presidency of the Pope himself, with Gasparri, Secretary of the Sacred Congregation of Extraordinary Affairs, as Secretary. The collaboration of skilled canonists was assured and the cooperation of the hierarchy was confidently invoked. Soon the members of the hierarchy were invited each to appoint a canonist to represent him as a member of the body of Consultors and, through his

Metropolitan, to communicate his views to the Holy See as to the program of restoration. For ten years the learned body of Consultors labored under the guiding hand of Gasparri, who was its President, and who in recognition of his commanding and sagacious mastery of the enterprise, was created Cardinal in 1907. The single items of legislation were assigned to each of two Consultors who formulated the appropriate statute without reference to his colleague; they were then submitted to each of the two committees into which the body of Consultors had been divided; in the form in which they came from these committees they were reviewed and amended at least twice by the Commission of Cardinals. Every statute thus passed through at least four stages of critical inspection; some of them, through ten or more. The Consultors attained an initial uniformity in their formulations by adherence to a set of rules conceived as expressing desirable characteristics of the Code. Thus disciplinary matters were primary; faith and morals incidental. The statutes were to be written in elegant Latin, referring the previous law in its exact terminology, with the omission, however, of elements already obsolete or abrogated and the addition of opportune provisions, the latter to be earmarked as such. Where the previous law was subject to controversy the Consultor was to take a definite position and set it down unequivocally.

Meanwhile, as harbingers of the dawn, there issued from the Pope the decree, *Ne temere* (August 2, 1907); the Constitution, *Sapienti consilio* (June 29, 1908); and the decree, *Maxima cura* (August 20, 1910). A foretaste of the reformed legislation was thus afforded in the spheres of marriage law, curial organization, and parochial tenure, respectively.

Beginning with 1914, separate groups of canons when thus compiled were submitted to the members of the hierarchy; their criticism, catalogued and organized by Cardinal Gasparri, were submitted to the Commission of Cardinals. Passing from its hands, the Code was then (1916) opened to the whole College of Cardinals and to the prelates of the Curia for review. In its final form it merited the rejoicing with which the hierarchy and the great body of canonists welcomed its promulgation in the Constitution of Benedict XV, *Providentissima mater Ecclesia* (May 27, 1917), which established the following Feast of Pentecost (May 19, 1918) as the date on which it would have the force of law.

The solicitude of the compilers of the Code sprang from their appreciation of the reverence due both the legislation of the past and its adjustment to modern needs. That veneration breathes in every syllable of the statutes they framed, reviewed, and endorsed. It flowed from their ardent spirits into their work and thence into the breasts of canonists everywhere. Not only did a living Code emerge from the antique litter already condemned by sophisticated jurists to the annals of oblivion, but it rescued the complacent, if not depairing, spirits of canonists everywhere and imbued them with the fervor that brought the momentous undertaking to a glorious and successful conclusion. Again the science of canon law breathes and lives and flourishes, the devoted object of scholars daily increasing in number and brilliance. It is for this that on the twenty-fifth anniversary of its enactment, THE JURIST is privileged to pay its meed of honor and gratitude to a document that merits the highest esteem, if not of all men, at least of all of the household of the Faith.

THOMAS JEFFERSON, AUTHOR OF THE STATUTE OF VIRGINIA FOR RELIGIOUS FREEDOM *

IT was in the late years of his life, that Thomas Jefferson, Third President of the United States of America, wrote his own epitaph which now adorns the tombstone at Monticello:[1]

> Here lies Thomas Jefferson,
> Author of the Declaration of Independence,
> Of the Statute of Virginia for Religious Freedom,
> And Father of the University of Virginia.

There are many more outstanding feats of Thomas Jefferson which constitute an inseparable part of the history of the United States, but nothing could express better the tenor of the principal ideals for which this true father of Americanism strove than this very significant summary of a life, devoted entirely to the ennobling of a nation: Political freedom, religious freedom, and freedom of sound, scientific work and learning, based on the ardent belief in the self-evident truths, " that all men are . . . endowed by their creator with certain unalienable rights." Such are the principles of Jefferson's life-long endeavors. They are enshrined in the fundamental political idea of the United States as the guiding principles of her government.

There is no doubt that the " Act for Establishing Religious Freedom " which finally became law on the 16th of January 1786 did not make Virginia the first state of this continent to proclaim and secure freedom of worship. Calvert's Maryland Patent, Roger Williams' effort in Rhode Island, William

* This article is contributed and published as a tribute of esteem to Thomas Jefferson in commemoration of the second centenary of his birth, April 13, 1743.

[1] Albert Ellery Bergh, *The Writings of Thomas Jefferson*, 20 vols. (1907), XII, p. i, XVII, p. vii; Philip Alexander Bruce, *History of the University of Virginia 1819-1919*, 2 vols. (1920), I, pp. 2, seq.

Penn's Charter in Pennsylvania and Delaware, were milestones on the road toward a general establishment of mutual toleration and true religious freedom. Nevertheless Virginia's legislative act gained much greater influence than one should have expected from the statute of a member state of this Union. This is due to the fact that this law, more precisely than others, reflects and contains this outstanding philosophical principle of the Founding Fathers of the Nation. Jefferson was right in putting the importance of his authorship of the Virginia Act on a level equal with the drafting of the Declaration of Independence. The " Act for Establishing Religious Freedom " is not a mere application of, or a supplement to the principles as expressed by the Declaration of Independence, but the essential counterpart of it, thus, both, in combination, form a harmonious unity, acknowledging the necessary natural rights and duties of man in his relations to God and to his neighbors.

1. " A Summary View "

The " Act for Establishing Religious Freedom " has a very momentous background in the history of Virginia, which was sometimes very alien to those principles which the act represents. Nevertheless it was this historical background with its inconsistencies and gradual evolution from a rather narrow basis to the broad field of true religious freedom which formed the cradle of this bill. This alone would, however, not have resulted in its characteristic philosophy or its actual importance beyond the borders of the first state of the Union, if not for Jefferson, and his high-minded Virginia friends who made these principles an integral part of the political philosophy of the Revolution.

Religion was, from the very outset of Colonial Virginia, an essential element and an acknowledged aim in the founding of the settlement. This is expressed in the Gilbert and Raleigh Patents, outlining the Colonial policy,[2] and repeated in the

[2] Sanford H. Cobb, *The rise of religious liberty in America* (1902), p. 74; Sadie Bell, *The Church, the State, and Education in Virginia* (1930), p. 4;

first Virginia charter, given by James I, in 1606, to Sir Thomas Gates, reciting the hope, "that so noble a Work . . . may . . . tend to the Glory of his Divine Majesty, in propagation of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God." [3] We find the same motives in the subsequent charters of 1609 and 1612, although religious aims were not the only ones to cause and further this enterprise. The founding was by no means based solely on such aims, but should obviously serve "both for the Christian religion and for the increase of Commerce." [4]

The new colony was an extension of the civil and religious government of the mother country. Civil and religious legislation, therefore, was to be in harmony with that of England; and this means that the political philosophy determining the government of Virginia was to be sought in the Acts of Supremacy and Conformity.[5] This ideology evidently differed widely from what should inspire Jefferson at the outset of the American Revolution. Toleration or religious freedom was to be excluded from the colony. The instructions of 1606 which accompanied the First Charter, prescribed "that the true Word and Service of God be preached, planted, and used . . . according to the Rites and Doctrine of the Church of England." [6] The Anglican Church, strongly represented in the membership of the Virginia Company, was the only religion permitted, forming an integral element of the state. Citizen-

Richard Hakluyt, *The Principal Navigations Voyage Traffiques and Discoveries of the English Nation,* 12 vols. (1904), VIII, pp. 21, 294; William Stith, *History of the First Discovery and Settlement of Virginia* (1747)—Sabin's Reprints, no. VI (1865), p. 5.

[3] W. W. Hening, *The Statutes at Large,* 13 vols. (1809-1823) 1H58 (All works contained in Earl Gregg Swem's outstanding *Virginia Historical Index* [*VHI*], 2 vols. [1934-1936], are quoted as suggested there, thus 1H58 = Hening, I, p. 58).

[4] Alexander Brown, *The Genesis of the United States,* 2 vols. (1891), I, pp. 448, 449.

[5] Bell, *loc. cit.,* p. 37.

[6] Bell, *loc. cit.,* p. 37; Stith, *loc. cit.,* 37; 1H68.

ship and membership of the Church were inseparable requirements. Thus immigration of non-Anglican subjects was prohibited. The charter of 1609 was especially alert to bar the access of any "suspected to effect the superstitions of the Church of Rome," [7] and ordered the Oath of Supremacy of anybody wishing to enter the colony.[8] Maintenance of this system was to be secured by the "Lavves Diuine, Moral and Martiall," the so-called Code of Governor Dale,[9] which placed the control of the religious functions in the military and civil arm of the government.[10]

We know that this state of affairs existed when Lord Baltimore arrived in 1629. Because of his refusal to take the Oaths of Allegiance and Supremacy tendered him, he was not allowed to remain within the colony. The grant of the Maryland Charter to the second Lord Baltimore in 1632 was the most striking result of this historic event.[11]

The tendency of the colonial government and administration was very outspoken toward the maintenance of the established order. Neither the political changes in the mother country during the first half of the seventeenth century nor the growing religious dissent in England or in other colonies could alter the official attitude. Puritan influence in Virginia [12] be-

[7] Brown, *loc. cit.*, p. 236.

[8] Susan Myra Kingsbury, *The Records of The Virginia Company of London*, 2 vols. (1906), I, p. 400.

[9] William Strachery (editor), *For the Colony in Virginea Britannica. Lavves Diuine, Morall and Martiall, &c.*, London, 1612—Peter Force, *Tracts and Other Papers*, 4 vols. (1836-1848), III; with regard to the authorship, see Walter F. Prince, *The First Criminal Code of Virginia*—Annual Report, Amer. Hist. Ass'n (1899), I, no. IX.

[10] Bell, *loc. cit.*, p. 38.

[11] *Virginia and Maryland, Or, The Lord Baltimore's printed Case*—Force, *loc. cit.*, II; George Boniface Stratemeier, O.P., *Thomas Cornwaleys, Commissioner and Counsellor of Maryland* (1922), pp. 7, 12, 13; James S. M. Anderson, *The History of the Church of England in the Colonies*, 2 vols. (1845), II, p. 117.

[12] Edward D. Neill, *The English Colonization of America* (1871), pp. 278, seq.; Philip Alexander Bruce, *Institutional History of Virginia in the 17th Century*, 2 vols. (1910), I, p. 252; John Fiske, *Old Virginia and her Neighbors*, 2 vols. (1897), I, pp. 301, 302.

fore the era of the Commonwealth was equally resented as the growing Catholic settlement in neighboring Maryland. Rigorous orders were issued, in 1634 and 1637, to officers of seaports to permit none to pass without proof of having taken the oaths " and the like Testimony from the Minister of the Parish of his Conversation, and Conformity to the Orders of Discipline of the Church of England." [13] In 1636, a similar order was issued against " unconformable " ministers and none was permitted to pass without sanction from the Archbishop of Canterbury and the Bishop of London. [14] Particular legislative acts in 1630, 1632, 1643 and 1647 [15] were enacted to enforce conformity with the Church of England.

But we would come to quite wrong conclusions if we would take this governmental policy for the general expression of the will of the people of Virginia. It is just because of the growing estrangement between the true feelings of the people and the official church policy that the administration was obliged to enforce by severe legal measures its own ideas of Religion.[16] Ignoring the liberal attitude after the Puritan Revolution,[17] the Virginia legislation proceeded to reestablish the Church of England on a stronger basis than ever.[18] However, by proceeding in this way, it contributed to gradually increasing changes of the Established Church itself. One must not forget that the Church in the mother country was subject to many differing influences during the seventeenth century; similarly in Virginia, Colonial life impressed its customs and ideas on the Church too. In spite of all the official rigorism, the Established Church of Virginia was, in the mid-

[13] Ebenezer Hazard, *Historical Collections*, 2 vols. (1792), I, pp. 347, 421; Bell, *loc. cit.*, p. 39.

[14] Hazard, *loc. cit.*, I, p. 420; Anderson, *loc. cit.*, II, p. 21.

[15] 1H149, 155, 277, 341.

[16] Bell, *loc. cit.*, pp. 42, 43.

[17] E. g. in the instructions Governor Berkeley brought with him in 1662—see: Anderson, *loc. cit.*, II, p. 549.

[18] Hamilton J. Eckenrode, *Separation of Church and State in Virginia* (1910), p. 11; 1H433, 478.

dle of the seventeenth century, " neither Episcopal, Presbyterian, nor Congregational; it was peculiar and colonial. The union of church and state put the church under a political control, and that control took its character from existing political conditions. Vestrymen were usually politicians and frequently burgesses. The church was thoroughly subordinated to the state." [19]

From the beginning of the Commonwealth era till nearly the end of the seventeenth century, this strict regime underwent certain changes, forcing the administration to yield on several points. Of course, the official policy did not neglect any possibility to maintain or restore its power in ecclesiastical matters, but, notwithstanding these efforts, the common trend went mostly against it. There were many reasons for this development, practical and ideological. One of the most important practical reasons was the need for industrious settlers. The previous attitude of the government had discouraged most Catholic and Puritan settlers, although it can be taken for granted that some of them, including Catholics, continued to stay in Virginia.[20]

About the year 1650, a Catholic family by the name of Brent settled on the Virginia side of the Potomac. They later took possession of a large territory in what is now Prince William County,[21] and received from James II in 1687, for themselves and for " all and every Inhabitants which now are or hereafter shall bee settled " on their tract of land, the right to " free exercise of their Religion without being prosecuted or molested upon any penall laws or other accounts for same."[22] Although Captain Brent's records, as given in a testimonial from the Stafford County Court,[23] showed " his fidelity in not seducing

[19] Eckenrode, *loc. cit.*, p. 14.

[20] Bell, *loc. cit.*, pp. 44, 45. For the presence of Catholic priests: Peter Guilday, *The Catholic Church in Virginia, 1815-1822* (1924), pp. xi, seq.; 1H268, 269.

[21] 2V272-275, V = *Virginia Magazine of History and Biography;* see footnote 3.

[22] W. B. Chilton, *The Brent Family*—17V308, seq.; Bell, *loc. cit.*, p. 47.

[23] 8 V 239: *Notes from the Council and the General Courts Records, 1641-1672*, by Conway Robinson; Bell, *loc. cit.*, p. 46.

any persons to the Roman Catholic religion," growing sentiment against Catholics, partly caused by the revolution in England in 1688,[24] partly due to resentments and rumors about Catholics in Maryland,[25] resulted in the maintaining of the administration's negative policy towards Catholics in general. King James II's Declaration of Indulgence (1687) had been recognized in Virginia only by a proclamation of Governor Lord Howard of Effingham, who was a Catholic.[26] The governor's policy of dispensing with the Oaths of Allegiance and Supremacy and of admitting as councillors men reputed to be Catholics, were only episodes, strongly opposed by Virginians favoring the Establishment. We know of law proceedings against Catholic priests.[27] The new Act of Toleration of the British Parliament [28] although very reluctantly received by the colonial administration and legislature, was at least satisfying to the inherited Virginia policy: it did not apply to Catholics. Catholic services, if any, could be held only secretly. The contemporary Swiss Francis Louis Michel made the very significant remark: " There are also some Catholics, who can hold their religious services in Maryland. But there are only a few of them." [29]

Besides Catholics, Quakers seem to have attracted great, but rather unfriendly attention from the defenders of the estab-

[24] 30 V 34-37.

[25] 15 W(1) 190; W(1) = *William and Mary College Quarterly Historical Magazine, first series;* see footnote 3.

[26] Bell, *loc. cit.*, 47; Bruce, *Inst. Hist.*, I, p. 244; 19 V 151, 153.

[27] 1 W(1) 46, 47.

[28] Bell, *loc. cit.*, 47; Edward P. Cheney, *A short history of England* (1904), p. 512. The application of the Toleration Act to Virginia has been fully acknowledged by the Assembly in 1609, see: Eckenrode, *loc. cit.*, p. 32; Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia* (1900), p. 20.

[29] " Report of the Journey of Francis Louis Michel from Berne, Switzerland, to Virginia, October 2, 1701–December 1, 1702," 24 V 23; J. G. Shea, *Life and Times of the Most Rev. John Carroll* (1888), II, p. 257; E. F. Humphrey, *Nationalism and Religion in America, 1774-1789* (1924), p. 252; Bell, *loc. cit.*, p. 49.

lished church policy in Virginia during the seventeenth century. It is commonly accepted that Quakers made their first appearance in Virginia about the year 1656.[30] Already in 1660, an act was passed aiming at the complete suppression of the Quakers on the ground that their views were hostile to religion, law, and "all bonds of civil societie."[31] Other hard measures followed suit,[32] although it is very probable that the government was not able to enforce their complete execution. The quiet resistance of the Quakers and their continuous array of petitions eventually succeeded in gaining a limited toleration through the recognition of the Act of Toleration in 1699,[33] and this situation remained practically unchanged until the Revolution.

The same resentful attitude as applied to Catholics and Quakers was adopted against other attempts towards disintegration of the established ecclesiastical order. One of these problems was the question of baptism, "which as a part of the discipline of the Established Church was a compulsory initiation into citizenship, of every child born in Virginia.[34] In 1662, an act imposed a fine of 2000 pounds of tobacco on parents of "scismaticall" ideas, who "out of the new fangled conceits of their owne hereticall inventions" refused to have their children baptized.[35] Other legislative acts dealt with blasphemous and "atheisticall" notions, thus revealing a further decline of religious integration.[36]

[30] Henry R. McIlwaine, "The Struggle of protestant dissenters for religious toleration in Virginia," *Johns Hopkins U. Studies in History and Political Science,* Twelfth Ser., IV, pp. 19 seq.; Bell, *loc. cit.*, pp. 55 seq.

[31] 1 H 532; Bell, *loc. cit.*, p. 56.

[32] 2 H 25, 29, 30, 37, 44-48, 180-183; Eckenrode, *loc. cit.*, pp. 12 seq.

[33] 3 H 170-171; McIlwaine, *loc. cit.*, pp. 29, 34; 5 W(1), 159; 2 T 271, T = *Tyler's Historical and Genealogical Quarterly* (see footnote 3); Bell, *loc. cit.*, p. 59, there also additional references.

[34] Bell, *loc. cit.*, p. 72.

[35] 2 H 165-166; Bell, *loc. cit.*, p. 72.

[36] Bell, *loc. cit.*, 73; Eckenrode, *loc. cit.*, p. 32.

It was chiefly due to this development of a crumbling religious disunity that the colony eventually, in 1699, acknowledged the application of the Toleration Act of the British Parliament.[37] It was rather a yielding to public opinion than a true grant of tolerance. "His Majesty's Protestant Dissenters" had to gain their ground step by step. Nevertheless the dissenters gained while the Establishment lost, not only as an institution of the state but also as a religious body.

The year 1699 is the turning point—far from being the climax—of the drama we are sketching. Up to this time the official policy of Virginia could—with very few and minor exceptions—maintain—*grosso modo*—the once assumed idea of an ecclesiastical order where an established church, as an institution and integral part of the colony, directed the worship of God under the strict control of the government and according to its laws. Religion was an element of the state. What religion had to be, how the people had to worship God was to be decided by the same authorities which—in principle—ruled the Church of England. This form of religion was compulsory at least in one way and another, as e. g., the obligation that the citizen should be baptized according to the rites of the Established Church. The citizen was obliged to obey the orders of the state not only in every usual civil matter and to contribute to the maintenance of this order,but he had also to obey—another branch of this order—church regulations, and to pay church taxes, fines for not attending services, etc.[38] Every dissent or disaccord with this established church order was a violation of rules, sanctioned by the supreme authority of the colony, and, therefore, legally liable to prosecution. Dissenters were nothing else but violators of law like all those others who did not obey the norms of the rightful authority.

We have to keep this in mind very clearly in order to understand the tremendous evolution from 1699 to 1786. After 1699 the existence of dissenters was at least reluctantly acknowledged by the authority of the colony. This was far from being

[37] 3 H 171; Eckenrode, *loc. cit.*, p. 32.

[38] Cobb, *loc. cit.*, p. 99.

a victory for one side or the other. It was not even yet a bridgehead on the shores of the established order. It was just a very limited advance into a still well organized front. The historic struggle which now begins has two main problems to solve which sometimes coincide and sometimes run apart: The achievement of religious freedom, and the disestablishment of the state church. The highlights of the first problem are article 16 of the Virginia Bill of Rights of 1776, and the famous act of 1786, while the other has its Two Penny Acts in 1755 and 1758, the famous " parsons' cause " in 1763 and the repeal of the incorporation in 1787.

Of course, this great struggle had many particular phases with positions gained and lost many times. Furthermore, this contest was not merely a political or legal affair, but a struggle involving religious and philosophical ideologies, and the final victory was in the first place one of ideas. There might have been, perhaps, a rather different outcome of this struggle—also from the standpoint of ideas—if the Established Church had been different. Its powerful representation in the administration, the House of Burgesses and the Assembly was not alone sufficient for survival. It lacked true religious life and lost, in a continuous decline, the people.[39] " The Virginia clergy, true to its training, still continued to preach Tillotson, Sterne and Blair to drowsy audiences. A cold rationalism claimed them. When they were denounced by itinerant evangelists for their lack of ardor, they retorted with denunciations of ' enthusiasm ' and ' fanaticism '. It is difficult to estimate the value of the Established Church and its influence upon the life of the community. Certainly Virginia produced a noble breed of men in this age. The lower classes, however, were not much benefited by the ministrations of the parsons." [40] It was a " dull and formal world," [41] which did not

[39] Cobb, *loc. cit.*, pp. 483, 484. Three out of four Virginians were outside the Established Church at the end of this period.

[40] Eckenrode, *loc cit.*, p. 36; Cobb, *loc. cit.*, pp. 106, 114; McIlwaine, *loc. cit.*, p. 66.

[41] Eckenrode, *loc. cit.*, p. 36.

attract those who longed for religion. No wonder that they turned to "the great evangelical revival as represented by the dissenting sects." [42] But this was not the sole reason; there were others, too, which made it difficult for the Established Church to receive a fresh impulse: decline was inevitable in the whole machinery of a government of which it was a part and to which it was chained till the end. When the Revolution rudely swept away an obsolete regime, the Established Church, as a political remnant, became an anachronism, unfit in its actual legal form for the future of the State of Virginia.

It was obvious that the acknowledgment of the Toleration Act by the Assembly of Virginia in 1699, only reluctantly conceded and even in later years disputed with regard to its extent and validity,[43] needed—in the eyes of the adherents of the established church order in the colony—to be met with countermeasures. It was the tendency to take precautions that influence on the administration in the direction of religious tolerance should be prevented as much as possible. Therefore, beginning with the same year, and continuing through the entire period, acts were passed, disqualifying recusants from voting in the elections,[44] from holding offices,[45] from management and guardianship of children, etc.[46] These laws were directed either against "popish recusants" only, thus maintaining a much older policy,[47] or against recusants in general.[48] One of these statutes was the rather grotesque "Act for disarming Papists and reputed Papists, refusing to take the oaths to the

[42] Eckenrode, *loc. cit.*, p. 31, pp. 28 seq.

[43] Eckenrode, *loc. cit.*, pp. 33, 34.

[44] Julius F. Prufer, *The Franchise of Virginia from Jefferson through the Convention of 1829*—7 W(2), 255 seq., esp. p. 259; *idem*—8 W(2) 22; 3 H 172; 7 H 517 seq.; 8 H 305 seq.

[45] 3 H 287 seq., 3 H 504 seq.; 5 H 467 seq.; 6 H 325 seq.

[46] 4 H 285; 5 H 449.

[47] 1 H 268, 269.

[48] Cf. the very interesting refusal of Rev. Samuel Davies, dissenting preacher, and President of Princeton College, to acknowledge various Articles, "declaring in what sense I take 'em when I declare my Belief of them"—25 W(1) 267-270.

government," which became law in one of the last outbursts of integral intolerance in 1756.[49]

But actions of this kind could only temporarily delay and partly protect a decaying regime; they could not prevent its final collapse. One of the well-known and also probably first cases of the application of the benefits of the Toleration Act, was the advice to the Presbyterian minister Francis MacKemie, as given by the governor, " that all Dissenters under his government shall have such liberty allowed them as the Law directs—provided they use it civilly and quietly and do not disturb the Peace of the Government." [50] Besides the Presbyterians, who from 1683 were reported as being in the colony and whose growth was promoted first by the French and Indian war, and later by the people's resentment against the " parsons' " cause,[51] Huguenots [52] and German settlers [53] were among the first to enjoy the Act of Toleration. Both came at the turn of the century. They did not intend to propagate their particular church doctrines, and were later absorbed by the Establishment and other religious bodies.[54] Although Baptists seem to have been in Virginia in the early colonial era, " they left no impression in the unpropitious seventeenth century." [55] They entered the colony in larger numbers about the middle of the eighteenth century.[56] The last to arrive were the Methodists, when Robert Williams settled in Norfolk in 1772 establishing the society there.[57]

[49] 7 H 35 seq.; see also: Percy Scott Flippin, *William Gooch, Successful Royal Governor of Virginia*—6 W(2) 21.

[50] 25 W(1) 144.

[51] Eckenrode, *loc cit.*, p. 34; for literature see Bell, *loc. cit.*, pp. 65 seq; William Henry Tappey Squires, *The Presbyterian Church in the Colony of Virginia* (1938).

[52] Eckenrode, *loc. cit.*, p. 31; Bell, *loc. cit.*, p. 50.

[53] Eckenrode, *loc. cit.*, p. 31; Bell, *loc. cit.*, p. 51.

[54] Eckenrode, *loc. cit.*, p. 31.

[55] Eckenrode, *loc. cit.*, p. 34.

[56] Bell, *loc. cit.*, p. 62; William Taylor Thom, " The struggle for religious Freedom in Virginia," *Johns Hopkins U. Studies in Historical and Political Science*, Ser. XVIII, no. 10-12 (1900).

[57] Eckenrode, *loc. cit.*, p. 34; Bell, *loc. cit.*, pp. 70 seq.; E. C. Branchi, *Memoirs of Philip Mazzei*, 9 W(2) 247 seq.; esp. p. 249: " The Methodist

It is perhaps one of the most significant symptoms of the true state of mind of those days that the most spectacular defeat of the old political order occurred in connection with the payment of taxes for the Establishment. As a result of failing crops and heavy financial burdens caused by the French war, an act was passed in 1755, "to enable the inhabitants of this colony to discharge their tobacco debts in money for this present year." [58] A similar act was adopted in 1758,[59] and was usually referred to as the Two Penny Act [60] owing to the fact that all debts including taxes could be discharged in money at a rate of two pence per pound of tobacco. As the salaries of the ministers, according to legislative provisions,[61] belonged to these public burdens, imposed on the tithables of the parish, the discharge of this obligation at a very low rate, affected vital problems of the clergy. As a temporary measure in time of depression, the act was justified, but when it was maintained in the following years when tobacco prices were much higher, the ministers could reasonably complain of the wrong done to them. It is extremely significant that even the defenders of the Established Church in the legislature, otherwise a most influential majority, failed to repeal the law. Their pretended religious interests seem to have succumbed to the advantage of greater profit and smaller taxes. But this is not the only characteristic moment of the "parsons' cause". Even the failure to repeal this act would have meant nothing, if the vestries in whose power the question of taxation played an important role,[62] had been composed of members of truly religious feeling, for every single vestry could have arranged matters—in spite of the act—in favor of its minister.

ministers in England were then called, and probably are yet, the 'Jesuits of the Protestants.'"

[58] 6 H 568.

[59] 7 H 240; Cobb, *loc. cit.*, pp. 108 seq.

[60] Bell, *loc. cit.*, p. 85.

[61] For literature and acts, see: Bell, *loc. cit.*, pp. 82 seq.

[62] Bell, *loc. cit.*, p. 81; P. S. Flippin, *The Financial Administration of the Colony of Virginia* (1915), p. 20.

Instead of this, however, the vestries joined in the general revolt. Many members already belonged to the dissenting sects or were in favor of them. Others were more interested in their own financial advantage than in the protection of the ecclesiastical interests at stake, and the reactionary minority was too weak to turn the tide. Thus the vestries became the parsons' opponents. The parsons in turn invoked the king's authority to void the ruinous act, and went to court against their vestries. There are several known court cases, but "the most noteworthy case of all, and one of the most celebrated law suits in American history, was that of James Maury, rector of Fredericksville parish, which came up in Hanover court in 1763" [63]—it was "the parsons' cause". The parsons who had watched with greatest eagerness the outcome of their case, lost: "The jury, which was partially composed of Presbyterians, brought in a verdict of one penny damages and the court refused to grant a new trial." [64] Although the legality of the act could not be denied by the court, the jury expressed in its "one penny verdict" the rising public resentment against a whole system which had nearly come to an end. "It was at this moment that Patrick Henry appeared as the counsel for the vestry and delivered the speech which made him famous." [65] His speech had—very characteristically—little to do with the law of the case, but the case was the long desired opportunity to denounce the scorned colonial set-up and its doctrine, and to proclaim one of the philosophical principles of the Revolution: "that a king, by annuling or disallowing acts of so salutary a nature, from being the father of his people, degenerates into a tyrant, and forfeits all right to his subjects' obedience." For these men "the parsons' cause" had gained quite a different meaning: it was escape from chains which bound persons no longer adherents of the Established Church, and a step to freedom of worship. The fact that the

[63] Eckenrode, *loc. cit.*, p. 25.

[64] Eckenrode, *loc. cit.*; cf. William Stevens Perry, *Historical Collections relating to the American Colonial Church*, vol. I, *Virginia* (1870), pp. 497 seq.

[65] Eckenrode, *loc. cit.*

parsons had appealed to the king against the colonial will, helped only to precipitate the crisis. "Henry fought the battle of the whole colony." [66]

Events pertinent to this study, during the last years preceding the Revolution, did nothing but reflect the seething tension on the eve of the time to come. Mob violence accompanied religious agitation on the one side; and persecutions were attempted on the side of the government.[67] An array of petitions to extend the privileges of religious freedom urged the House of Burgesses to act in favor of this principle.[68] But none of the resulting lame acts and half-hearted resolutions which were debated or passed in the "Committee for Religion," or in the House [69] could bring adequate satisfaction.[70]

The hour struck at the General Convention of representatives of the colony in 1776, when on the 12th of June, the "Declaration of Rights" was unanimously adopted, proclaiming in its sixteenth article: [71] "That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forebearance, love and charity towards each other."

[66] Eckenrode, *loc. cit.*, p. 26.

[67] Eckenrode, *loc. cit.*, pp. 36, 37. For the persecution of Baptists: R. B. Semple, *History of the Rise and Progress of the Baptists in Virginia* (1810), p. 20; James, *loc. cit.*, p. 29; Lewis Peyton Little, *Imprisoned Preachers and Religious Liberty in Virginia* (1938).

[68] Eckenrode, *loc. cit.*, pp. 38 seq., with references from the Journals of the House of Burgesses, 1769-1772; James, *loc. cit.*, 38 seq., p. 48.

[69] Eckenrode, *op. cit.*, p. 39.

[70] Eckenrode, *loc. cit.*, p. 40; James, *loc. cit.*, p. 18.

[71] For the history of the drafting, the proposed, or adopted amendments, and the final text: W. C. Rive, *Life and Times of James Madison*, 3 vols. (1866), I, p. 142; James, *loc. cit.*, p. 62; Cobb, *loc. cit.*, p. 492; Eckenrode, *loc. cit.*, p. 44; cf. *infra*, pp. 214 seq.

This famous article, whose authorship is connected with the equally famous names of George Mason and Patrick Henry,[72] was the first precise application of a principle, fundamental to the Founding Fathers of the United States.

2. "The Severest Contests"

This is the historic past to which Jefferson refers in his *Autobiography*[73] and in the *Notes on Virginia*.[74] We have tried to outline what Jefferson has termed "a summary view of that slavery under which a people have been willing to remain, who have lavished their lives and fortunes for the establishment of their civil freedom,"[75] in order to sketch the picture of a development that had been in his mind long before he set about to enter *his* struggle for religious freedom. When the Williamsburg Convention of 1776 adopted the Virginia Bill of Rights, her famous delegate was in charge of another fundamental task—fundamental in its very sense—namely that of writing the young Nation's Declaration of Independence, at the Continental Congress at Philadelphia. Article 16 of the Virginia Bill of Rights was not directly influenced by Jefferson.[76] But from then on the entire picture changed, and he became the leading, the guiding, and eventually the victorious spirit of the struggle for religious freedom.

[72] For the disputed authorship: Guilday, *loc cit.*, p. xx; James, *loc. cit.*, pp. 62 seq.; Eckenrode, *loc. cit.*, pp. 43 seq.; K. M. Rowland, *The Life of George Mason 1725-1792, including his speeches, public papers and correspondence*, 2 vols. (1892), I, p. 237; 1 W(1) 45; Rive, *loc. cit.*, I, p. 161; W. W. Henry, "The Part taken by Virginia, under the leadership of Patrick Henry, in establishing Religious Liberty as a foundation of American Government (1888)," *Amer. Hist. Ass'n Papers*, II (1888), no. 1, p. 29; *idem*, "Reply to Dr. Stillé upon Religious Liberty in Virginia," *Amer. Hist. Ass'n Papers*, III, (1889), no. 2, pp. 455 seq.; Cobb, *loc. cit.*, pp. 491 seq.

[73] *Writings* (see footnote 1), I, pp. 56 seq.

[74] *Writings*, II, pp. 219 seq.

[75] *Writings*, II, pp. 220, 221.

[76] Eckenrode (*loc. cit.*, p. 4): "The Bill of Rights was drawn up in large part, or in its entirety, by Mason, and he also drafted the constitution. Jefferson probably wrote the preamble, and there are those who think he composed the main part of the constitution, but the evidence for this is wanting."

"When I left Congress in '76," he tells us in his *Autobiography*,[77] "it was in the persuasion that our whole code must be reviewed, adapted to our republican form of government." There can be no doubt that Jefferson was in accord with the principles of the said article 16, although he immediately realized the dangerous weakness of the way in which the convention had been trying to discharge its task: "When they proceeded to form on that declaration the ordinance of government, instead of taking up every principle declared in the bill of rights, and guarding it by legislative sanction, they passed over that which asserted our religious rights, leaving them as they found them."[78] The spirit had been changed, but not the law and its administration.

This is the point at which Jefferson started. When Virginia's General Assembly met in the Fall of 1776, he was determined to commence his great crusade for the realization of the philosophy of the American Revolution, by entering the struggle for the fulfillment of the principle of religious freedom. It was not a mere side issue of the reform he had in mind, but a very timely and logical starting point. The completion of the promise, given in article 16, meant the repeal of all acts contrary to the principle of religious freedom, and the disestablishment of the Established Church, and thus the abrogation of every illegitimate restriction and domination on religion. The struggle to achieve this program should become a test whether and to what extent the Revolution was to live up to its ideals.

Jefferson was appointed a member of nearly all the major committees,[79] among which that on Religion was the most important for our study. His aim at a general reform, including the disestablishment of the Anglican Church, gained many outside stimuli through the flood of petitions from various dis-

[77] *Writings*, I, p. 62.

[78] *Writings*, II, p. 219; Eckenrode, *loc. cit.*, pp. 45 seq.; at p. 72 he says: "The Revolution had produced a modified religious liberty, but it had not settled the relations of church and state in a broad sense."

[79] Eckenrode, *loc. cit.*, pp. 46-47; James, *loc. cit.*, p. 68.

senting church groups, directed against the Establishment, and for the true realization of religious freedom.[80] The struggle had begun. Every step supporting these ideas aroused the opposition of those in favor of the Establishment and the maintenance of the old order.[81] The Journals of the House of Delegates and the *Virginia Gazette* have preserved for us a very lively picture of the general state of emotion accompanying the proceedings.[82] From the solitude of the last years of his momentous life Jefferson looked back, with well deserved pride, and still with very vivid emotion at " the severest contests in which I have ever been engaged. Our great opponents were Mr. Pendleton, and Robert Carter Nicholas; honest men, but zealous churchmen. The petitions were referred to the committee of the whole house on the state of the country; and, after desperate contests in that committee, almost daily from the 11th of October to the 5th of December, we prevailed so far only, as to repeal the laws which rendered criminal the maintenance of any religious opinions, the forebearance of repairing to church, or the exercise of any mode of worship; and further, to exempt dissenters from contributions to the support of the established church; and to suspend, only until the next session, levies on the members of that church for the salaries of their own incumbents. For although the majority of our citizens were dissenters, as has been observed, a majority of the legislature were churchmen. Among these, however, were some reasonable and liberal men, who enabled us, on some points, to obtain feeble majorities." [83]

The accomplishments of the Fall session fell short of Jefferson's desired goal. They were in fact a compromise,[84] although his opponents lost by far more than he. The six reso-

[80] *Writings*, I, p. 57; James, *loc. cit.*, pp. 68 seq.; Eckenrode, *loc. cit.*, p. 48.

[81] James, *loc. cit.*, pp. 75 seq.; Eckenrode, *loc. cit.*, pp. 47 seq.

[82] Bell, *loc. cit.*, p. 90 and 90[344].

[83] *Writings*, I, pp. 57-58; II, pp. 219, 220, VII, pp. xii-xv; XII, pp. xv-xvi; Cobb, *loc. cit.*, p. 493. For a belittling statement of the severity of the contest (Caleb Wallace), cf. Eckenrode, *loc. cit.*, p. 51.

[84] Eckenrode, *loc. cit.*, p. 50.

lutions [85] of the House virtually repealed all acts of Parliament mentioned in his narratives, but Jefferson did not succeed in repealing the legal tie which still dominantly connected the Establishment with the State. When, however, the convention, on the 9th of December, put into effect "an Act for exempting the different societies of Dissenters from contributing to the support and maintenance of the church as by law established, and its ministers, and for other purposes therein mentioned",[86] suspending in its sixth and most important article the levy for the support of the Anglican ministers until the end of the next session in the Summer of 1777, and expressing the conviction that it was "judged best that this should be done for the present by voluntary contributions", the Established Church had lost the battle. Although Jefferson complained that "we could only obtain a suspension from session to session until '79 when the question against a general assessment was finally carried and the establishment of the Anglican Church entirely put down",[87] there remains the fact "that no taxes for religious purposes were ever paid in Virginia after January 1, 1777." [88]

However, Jefferson was right when he regarded the results as insufficient, and unsatisfactory. It was not only the fact that the problem of the Establishment was but suspended, there still remained many statutes of the common law, and of the colonial legislation,[89] at variance with the proclaimed principle of religious freedom. The work was not completed by the legislature of 1776. The repeal of oppressive laws did not embrace all of them. The fundamental question still unsolved was whether the principles of the said article 16 could be declared a law, carrying such sanctions that religious freedom would be secured once and forever, voiding any act of legisla-

[85] James, *loc. cit.*, pp. 79, 80.

[86] 9 H 164 seq.; Eckenrode, *loc. cit.*, pp. 51 seq.

[87] *Writings*, I, p. 59.

[88] Eckenrode, *loc. cit.*, p. 53.

[89] *Writings*, II, pp. 219, 220.

ture, be it from the past, or in the future, contrary to this principal statute.

The contests Jefferson had to meet at the Fall convention of 1776 confirmed him in his conviction that the reactionary opposition to his ideals was only retreating into better strategic positions and had not yielded to the demands of the basic principles of the proclaimed Bill of Rights. Jefferson left no doubt about the honesty and fairness of gentlemen like Pendleton or R. C. Nicholas, but he saw evil forces behind these men which tried to take advantage of their conservative views. Reaction and conservativism was not the same. Among the conservatives were those forces which kept the stream of the Revolution within its borders. They acted as correctives. But there were others, too, whose pretended conservativism was in truth opposition to the new ideals. These true reactionaries hoped to retake their positions after the force of the Revolution had been spent. Then after that, they dreamed to retake what had been lost during the initial years.

It was the great talent of Jefferson to foresee the danger which was to come and which actually came in the years following the peace in 1783, even to gain in strength by Fall of 1784.[90] It was due to Jefferson's political foresight and to the experience of his contests in 1776 that he took the next step by preparing, in 1777, the draft of his famous "Act for establishing religious freedom in Virginia." [91]

The conflict of the following years brought about no decisive solution of the issue, although Hening reports many acts dealing with matters connected with religious problems.[92] This first interlude ended with the appointment of Thomas Jefferson as second governor of Virginia on June 1, 1779. Jefferson had to abandon his seat in the House, but only to gain greater influence. His supporters in the House sponsored, in the

[90] Eckenrode, *loc. cit.*, p. 91; we are here taking exception to E's too narrow conception of conservativism, as being almost an equivalent of reaction.

[91] *Writings* (I, p. 257): "I prepared the act for religious freedom in 1777, as part of the revisal."

[92] 9 H 312, 317, 318, 345, 387, 436, 439, 440, 442, 443, 469, 525, 567, 578.

Spring session, a bill "for religious freedom", an idea obviously originating from the new governor. The House appointed John Harvie, George Mason, and Jerman Baker to prepare the bill.[93] Nothing could prove better that this was the result of Jefferson's work and direction than that, when, on June 12 John Harvie presented the bill for religious freedom, he introduced in fact Jefferson's draft of 1777.[94] This was a challenge, evidently intended to test the ground, and, if possible, to prepare for the next step. After all, it was a clear and frank statement of policy with regard to the question of religious freedom. As it appears, nothing more had been projected by Jefferson and his friends for the Spring session. Contrary to the program of 1776, when Jefferson tried to carry his fight to a sudden triumph, he must have realized that the opposition was still too strong for surprise moves. Thus, as Eckenrode comments, the Spring session "came to an end with the religious question in exactly the same position as before." [95]

During the recess, Jefferson's bill seems to have drawn the widest attention for we meet many petitions, favoring or opposing it, at the opening of the Fall convention.[96] One of Jefferson's chief aims in pursuing his objective, namely the elimination of the Establishment's predominance, came closer to realization when the act of 1776, suspending the laws providing salaries for the clergy of the Established Church, was made perpetual at this session.[97] On the other hand, his favorite act for the establishing of religious freedom was subjected to stern critical discussion without reaching the final third reading. Neither did the bill "concerning religion" which had been introduced by James Henry, of Accomac, on October 25, presenting the conservative demands.[98] The lat-

[93] Eckenrode, *loc. cit.*, p. 56.

[94] Eckenrode, *loc. cit.*, p. 56.

[95] Eckenrode, *loc. cit.*, p. 56.

[96] Eckenrode, *loc. cit.*, p. 57.

[97] *Writings*, I, p. 257; II, p. 219; 10 H 197.

[98] Eckenrode, *loc. cit.*, p. 58; MS Virginia State Library, Collection of Bills, 1779: (1) "For the encouragement of Religion and virtue, and for removing

ter bill was by all means the most outstanding proposal of the conservatives, aiming at the preservation of the "Christian Religion" which should "in all times coming be deemed and held to be the established Religion of this Commonwealth; and all Denominations of Christians demeaning themselves peaceably and faithfully, shall enjoy equal privileges, civil and Religious." The tenor of this demand was the Establishment of a Christian state religion instead of a state church and the granting of tolerance to "all persons and Religious Societies who acknowledge that there is one God, and a future State of rewards and punishments, and that God ought to be publickly worshiped." This was an obvious attempt to compromise the complaints of the Christian dissenters with the aims of those

all restraints on the mind in its inquiries after truth, Be it enacted by the General Assembly, that all persons and Religious Societies who acknowledge that there is one God, and a future State of rewards and punishments, and that God ought to be publickly worshipped, shall be freely tolerated.

(2) The Christian Religion shall in all times coming be deemed and held to be the established Religion of this Commonwealth; and all Denominations of Christians demeaning themselves peaceably and faithfully, shall enjoy equal privileges, civil and Religious.

(3) . . . .

(4) Whenever . . . free male Persons not under twenty Years of Age, professing the Christian Religion, shall agree to unite themselves in a Society for the purpose of Religious Worship, they shall be constituted a Church, and esteemed and regarded in Law as of the established Religion of this Commonwealth, and on their petition to the General Assembly shall be entitled to be incorporated and shall enjoy equal Privileges with any other Society of Christians, and all that associate with them for the purpose of Religious Worship, shall be esteemed as belonging to the Society so called.

(5) Every Society so formed shall give themselves a name or denomination by which they shall be called and known in Law . . . each Society so petitioned shall agree to and subscribe in a Book the following five Articles, without which no agreement or Union of men upon pretence of Religious Worship shall entitle them to be incorporated and esteemed as a Church of the Established Religion of this Commonwealth.

First, That there is one Eternal God and a future State of Rewards and punishments.

Second, That God is publickly to be worshiped.

Third, That the Christian Religion is the true Religion.

Fourth, That the Holy Scriptures of the old and new Testament are of divine inspiration, and are the only rule of Faith.

Fifth, That it is the duty of every Man, when thereunto called by those who Govern, to bear witness of truth."

who still were trying to save in one way or the other the institution of Establishment, thus maintaining the union of church and state, and the latter's continued participation in ecclesiastical affairs.

These two sessions of the Assembly were of great importance. Both groups, the progressives under the leadership of Jefferson, and the conservatives, had stated their intentions in their respective bills. Neither group was strong enough to defeat its opposition. The decision was again postponed, but it was to come.

The second interlude of this momentous drama took place between 1779 and 1784. It is the period in which the Established Church declined gradually towards its dissolution. Conditions were deplorable. Vestries were neglecting their duties, or dying out. It became more and more difficult to get subscriptions for the support of the clergy on a voluntary basis. Parishes were advertised and church properties came up for sale.[99] On the other hand, the Church of England was still the Established Church, but what had been in other times the source of strength and dominance, namely the ties with the state, now turned out to be a fetter, hindering any change or reconstruction. Even in 1784, the Assembly was still supposed to have the power to fix church doctrines and regulations,[100] but this power could reach only the Established Church. There was even a trend towards independence from the state among the more progressive members of the Established Church to keep pace with the expanding development of the dissenters. On the other hand, reaction, too, stood guard, waiting—as we mentioned already—to seize the long expected opportunity. Legislation during this period frequently concerned religious matters, but it lacked decisive importance.[101]

The finale began with 1784. Jefferson was at that time already Minister at Paris, leaving behind as the faithful inter-

[99] Eckenrode, *loc. cit.*, pp. 64, 65.

[100] Eckenrode, *loc. cit.*, p. 78.

[101] E. g. 10 H 288, 361, 381.

preter of his ideas his loyal life-time friend, James Madison, to whose efforts it is due that the act for religious freedom eventually became law.[102] Now the first move came from the supporters of the Protestant Episcopal Church, the newly adopted name of the Anglican Church in Virginia, asking "for an act of incorporation by way of adjusting its condition to the existing state of affairs."[103] A memorial expressly requested self-government for the clergy of the Church, independence, and a change in the laws "which restrain the said church from the like power of self-government, as is enjoyed by all other religious societies..."[104] This move was very significant. It shows the critical situation of the Established Church which tried to reorganize itself by getting the ties with the state cut in so far as they were hindering such a development, but to maintain, on the other hand, by an act of incorporation, as much as possible of its once outstanding position. This step reveals that the policy of opposing the main issue of a general regulation of the problem as proposed by Jefferson and his friends, and of making in turn, minor gains accompanied by small concessions eventually turned against its originators, and endangered the Establishment. Now the long expected opportunity seemed to be near, to restore—by taking advantage of all possibilities, the new ones as well as those from the past—the role of the Establishment under conditions adjusted "to the existing state of affairs." This time, the success was on the side of the petitioners. The bill passed on December 22, 1784, by a vote of 47 to 38.[105] The Protestant Episcopal church had gained incorporation.

Once this foothold had been gained, the next step at once revealed a project to restore financial subsidy. Petitions were presented for a general assessment for the support of religious teachers. A bill was brought in "for establishing a provision

[102] *Writings*, I, p. 257.

[103] Journal, House of Delegates, May 1784, p. 36.

[104] Quotations, Memorial, Protestant Ep. Ch., Eckenrode, *loc. cit.*, p. 79.

[105] Eckenrode, *loc. cit.*, p. 101.

for teachers of the Christian religion." [106] The bill and the accompanying committee report emphasized two principles: [107] First, that the state ought to give support to the general diffusion of Christianity; and second, that the state ought not to give any preeminence to anyone among differing sects. It provided for a general assessment by civil authority, and allowed each ratepayer to indicate the church which should receive the amount of his tax. The bill received the backing of Washington, Patrick Henry,[108] R. H. Lee, and Marshall but met the strongest opposition from Jefferson and Madison. It passed to the second reading, then the public distribution of leaflets with the text of the bill was ordered, and the people invited to send up to the next legislature the expression of their opinions.[109]

This was the time for action. Jefferson's able attorney, James Madison, and his friends realized this very clearly. There were but two possibilities left, a complete victory over the said proposals or a complete defeat, for the opponents of Jefferson's doctrine too had abandoned—in a mood of the prospective and probable victory—their policy of delaying and retarding interludes. These proposals as presented to the people consisted in a definite plan, aiming at a modified tolerance, coupled with an amended maintenance of the state's intervention in ecclesiastical affairs. They involved not only the question of assessment in favor of religious teachers. The entire problem of the relations between religion and the state, as presented by James Henry in 1781,[110] was brought up again. The remarkable support from men like Washington and Patrick Henry made this contest even more tense and decisive.

[106] Cobb, *loc. cit.*, p. 495.

[107] *Idem.*, loc. cit.

[108] Eckenrode (*loc. cit.*, p. 83): Henry's "conservative temper and his taste for strong government led him to espouse the policy of a state support of religion."

[109] Cobb, *loc. cit.*, p. 495.

[110] Cf., *supra*, p. 201, 202.

But Madison was not afraid of what was to come. He had waited for this moment. He seized it to score the final victory. The fact that this eventual stiff contest was fought openly between the conservative and progressive leaders of the Revolution on ideological principles shows the very high level on which this controversy was conducted.[111] Eckenrode is right when he says: "The main argument of the conservatives was . . . that religion is necessary to the welfare of the State and the supervision of the State necessary to religion."[112] There was no doubt about the honesty of thought, as expressed by the high ranking and high minded conservatives, but Madison and his friends saw, as in the earlier state of this struggle, the forces of reaction cheerfully rallying behind these men, not in order to support them, but to move forward at the right moment to achieve their own designs. This picture was already taking form. Groups of Presbyterians joined forces with Episcopalians, and seemed "as ready to set up an establishment which is to take them in as they were to pull down that which is to take them out."[113] The proposal to establish Christianity as the religion of the state to be supported by a public tax was discriminatory as against all non-Christians. Would that be the end of these aims, or just the beginning of a new era when parliament should have again to decide the "true" Christian creed, thus meaning the return to the defeated past?

Jefferson's supporters also put their case before the people. It was at the instance of Mason and other friends that Madison wrote his famous "Memorial and Remonstrance", in which he set forth the principles of true religious freedom stating that religion did not come within the cognizance of government, either as to the support of worship or as to inquiry into individual faith.[114] This remonstrance was circulated

[111] Eckenrode, *loc. cit.*, p. 111.

[112] Eckenrode, *loc. cit.*, p. 112.

[113] *Letters and other Writings of James Madison* (Congressional ed.), 4 vols. (1865), I, p. 144.

[114] Cobb, *loc. cit.*, p. 496.

among the people for signature. Both contesting groups drew up strong forces. Petitions drafted by the joint efforts of Madison and his friends against the pending bill were signed by about 10,000, but the sentiment in favor of the latter was also strong.[115] The reconvening Assembly was almost evenly divided when the "Bill for Establishing a support for teachers of the Christian Religion" eventually was defeated by three votes.[116] With this the assessment bill was also done for without being brought before the House.[117]

The close margin, and the growing popular sentiment in favor of Madison's move encouraged the progressives to launch the decisive offensive: On December 14th, 1785, Jefferson's bill for religious freedom was again brought up, six years after James Harvie's first attempt. Alexander White [118] was chosen to report to the House "that the bill had been considered and amended in committee." [119] On December 16th the House considered the amendment, striking out parts of the preamble of Jefferson's draft and proposing instead the following words: "Whereas, it is declared by the Bill of Rights, that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and it is the mutual duty of all to practice Christian forbearance, love and charity towards each other." [120]

[115] Cobb, *loc. cit.*, p. 497; Eckenrode, *loc. cit.*, p. 111.

[116] Eckenrode, *loc. cit.*, p. 113.

[117] Eckenrode, *loc. cit.*

[118] The description of the final passage of the bill follows closely Eckenrode, *loc. cit.*, pp. 113 seq. References from the Journals of the Virginia Legislature of this period had to be taken from the same author. We regret that due to war time conditions these precious documents of American History are unavailable at present. For the same reasons we had to relinquish our intention of giving an analysis of the proposed, rejected and adopted amendments showing the changes of the bill from Jefferson's draft to the final text.

[119] The bill was no. 82 in the list of bills in the Revised Code—House Journal, pp. 93, 94.

[120] House Journal, p. 95.

This amendment was defeated by a margin of 38 to 66 which indicates that many conservatives had joined forces with Madison's group.

The third reading occurred on December 17, when a motion for postponement of the reading until the following October (1786) was defeated. The bill passed the House by a vote of 74 to 20. Madison's leadership and convincing plea had won over almost half of the opposition. Brought before the Senate, the latter adopted another amendment, striking out the first page and twenty-one lines of the second, and inserting the religious article of the Bill of Rights.[121] But the House rejected this amendment, 35 to 56. The members voted in much the same way as on the former occasion.[122] The bill was returned once more to the Senate, which adhered to its amendment, sending the bill back on January 9, 1786, with a request for a conference. The House agreed and appointed Madison, Zachariah, Johnston and James Innes as its committee.[123] The Senate committee was composed of John Jones, Matthew Anderson, William Ellzey, Robert Rutherford and Walter Jones. The conference was held on January 12th. The next day the House adopted the amendment with amendments.[124] The Senate further amended this amendment to the amendment.[125]

On January 16th, the House considered the Senate's last amendments, which struck out a part of Jefferson's preamble and inserted instead what was to become the final text of the preamble.[126] The Journal mentions also other but minor changes.[127] None of them meant an essential change of the text.

121 Senate Journal, p. 61.

122 House Journal, p. 117.

123 House Journal, p. 135.

124 House Journal, p. 139.

125 Senate Journal, p. 90.

126 Cf. *infra*, p. 210; it includes the passages from: "Whereas Almighty God hath created . . . ," to: ". . . legislators and rulers."

127 House Journal, p. 143.

The House accepted these amendments, and on the same day, the 16th of January, 1786, the "Act for establishing religious freedom" eventually became law.[128] The struggle had been won.

3. The Bill

"Whereas,[129] Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author[130] of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers,[131] civil as well as ecclesiastical, who, being themselves but fallible and uninspired men have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others have established and maintained false religions over the greatest part of the world, and through all time; that to compel a

[128] 12 H 84.

[129] The act now forms part of the Virginia Code, Title 4, chapter 6, § 34, "Act of religious freedom recited. The General Assembly, on the sixteenth day of December, seventeen hundred and eighty-five, passed an act in the words following, to wit:"—cf. also § 35. The act, in fact, became law on January 16, 1786.

[130] Jefferson mentions an amendment without further reference: "an amendment was proposed, by inserting the word 'Jesus Christ,' so that it should read, 'a departure from the plan of Jesus Christ, the holy author of our religion;' the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination."—*Writings*, I, p. 67.

[131] "Jefferson had begun the bill with the assertion: 'Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible to restraint.'..."—Eckenrode, *loc. cit.*, p. 115. The Senate also rejected another phrase: 'That the opinions of men are not the object of civil government nor under its jurisdiction.' In *Writings* (II, p. 300) the text begins with "well aware," instead of "whereas."

man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical, and even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards which, proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors, for the instruction of mankind; that our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it; that though, indeed, those are criminal who do not withstand such temptation, yet, neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order; finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural

weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them:

"Be it enacted [132] by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

"And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies constituted with powers equal to our own, and that, therefore, to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind; and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

4. "The Rights Hereby Asserted Are of the Natural Rights of Mankind"

"For the first time in Virginia, a father who refused to subscribe to all the confessions of the Episcopal creed could claim the prerogative of guardianship over his own children; and for the first time, too, a Roman Catholic could testify in court," [133] —the integration of the natural right of religious freedom into the organic laws of the state was final. The repeal of the Incorporation of the Protestant Episcopal Church,[134] and several supplementary acts[135] concerning the

[132] *Writings* (II, p. 302): "Be it therefore enacted . . . ," which seems to be more conclusive, with regard to the explanatory character of the preamble.

[133] Bruce, *Hist. Univ. Virg., loc. cit.*, I, p. 26.

[134] 12 H 266.

[135] Acts of Virginia 1799, p. 8; Acts passed at a General Assembly of the Commonwealth of Virginia 1802, pp. 8-9.

property of this church were but the last liquidating consequences of a contest which had been won.

In trying to summarize the essential points of this momentous development which impressed a very significant and decisive mark on the history of the earliest decade of the Commonwealth of Virginia, we cannot do it otherwise than with sincere esteem for the fairness and lofty spirit which inspired the leading *dramatis personae*. It was during a life and death struggle for the existence and independence of the founding states that the delegates of Virginia, entrusted with the confidence of the people, fulfilled a task which even in the calm atmosphere of peace would have required the highest endowments of honesty and fairness. Parliamentarians of later generations throughout the world could have learned from this fine example of democratic methods. Statesmen of today could learn from the courage and responsibility of these men to apply principles early rather than to postpone application till later. And may it be that the men of tomorrow will look at the honorable gentlemen from Virginia when the natural rights of mankind will be restored to a liberated world to come.

The struggle was fierce. The opposing issues were stubbornly defended, and outside influence was sometimes disconcerting. But there was one common and unanimous point of agreement among all these men: that the belief in God must be preserved. This is, in our opinion, the most significant characteristic of the Revolution compared with the degeneracy of the French example: Americans were fighting on God's side in their struggle for liberty, and not against Him, in the name of freedom. Although conservatives and progressives differed widely and sometimes insurmountably in their opinions, the endeavors of all were positive, not negative or antireligious. This was the good star which shone over the cradle of the Union, leading these men toward true and honest freedom.

It was Hening, the famous compiler of the laws of Virginia, who made the fine remark: " In its preamble to this act, some variations have been made from the original bill, as reported

by the revisors, which render the style less elegant, though the sense is not affected." [136] The tenor of this act is embodied in the solemn *declaration,* " that the rights hereby asserted are of the natural rights of mankind," thus, in other words, religious liberty is a principle of natural law. In examining this act from the philosophical and methodical aspect one must return to the starting point, namely article 16 of the Bill of Rights. As we know, this article proclaimed the principle of religious liberty without issuing the necessary sanctions to insure this right. The article in its final wording, was the result of a very dearly achieved compromise between those who wanted the establishment of toleration only (Patrick Henry, George Mason), and the promoters of complete religious liberty (James Madison). Originally—as proposed by the sponsors—it contained the phrase: " that all men should enjoy the fullest *toleration* in the exercise of religion." [137] This was objected to by Madison who held—in remembrance of the past—that " toleration " was nothing but a grace which could easily be recalled. What he had in mind was liberty of religious opinion as a *right.* He, therefore, offered an amendment: " That religion, or the duty we owe to our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, all men are equally entitled to the full and free exercise of it, according to the dictates of conscience, and, therefore, that no man or class of men ought, on account of religion, to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities unless, under color of religion, the perservation of equal liberty and the existence of the state be manifestly endangered." [138] As we can see from the final text, the compromise did eliminate the term " toleration " by stating " that

[136] 12 H 84 (footnote); for an opinion, contrary to Hening: Eckenrode, *loc. cit.*, p. 115; for the characteristics of Jefferson's style in general: Carl Becker, *The Declaration of Independence* (1940), pp. 194, 196. Cf. Madison's letter to Jefferson, January 22, 1786, in *Madison's Letter and other Writings, loc. cit.*, I, pp. 213, 214.

[137] Rive, *loc. cit.*, p. 142.

[138] Rive, *loc. cit.*

all men are equally entitled to free exercise of religion, according to the dictates of conscience," though it dropped not only the word "full" but also the whole part intended to define some of the most essential elements of the right of religious freedom. What had been left was a mere statement of the principle as such, and the expression of man's duty to mutual respect—in other words—to mutual toleration in "Christian forbearance."

The proposals of Madison contain the same ideology which we find in Jefferson's so-called Fourth Draft of the Constitution—although the latter is less precise than the wordings of his friend: "All persons shall have full and free liberty of religious opinion; nor shall any be compelled to frequent or maintain any religious institution." [139] We can understand why neither Jefferson nor Madison could have been entirely satisfied with the phrasing of article 16. Besides the lack of sanctions it was weak in its definitions, tending rather backwards to tolerance in the sense of a grace than forwards to the *right* of religious freedom. We feel this criticism and the disappointment very vividly even in the tenor of the preamble of Jefferson's bill, drafted, as we know, the year following the acceptance of article 16.

Jefferson's bill had as a practical goal to insure the right of religious freedom against any violation or mutilation. He tried to achieve this in a three-fold way. First by stating the right reasons for the existence, and the necessity of an unrestricted operation of this right; then—in the second paragraph of the bill—by inserting a descriptive catalogue [140] of the foremost applications of this right to eliminate misinterpretations; and, finally, by basing it on the immutable and preterhuman sphere of Natural Law.

This method not only reveals the very concise mind of the realistic lawyer and cautious statesman Jefferson (who by no means forgot the dangerous *ars interpretationis juristarum*)

[139] Kate Mason Rowland, "A lost paper of Thomas Jefferson"—1 W(1) 34-45, esp. 42.

[140] Demonstrative, not exclusive or taxative.

but it also shows very distinct philosophical principles. To begin with the most essential point, we turn again to the stated principle, "that the rights hereby asserted are of the natural rights of mankind," to which is added another one, "that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right." This is, in our opinion, besides the principle of religious freedom, the most important, and next to it as an essential element of this act, for it states the independence of Natural Law from human legislation. Natural Law can be "declared", and certain rights, deriving from it, can be asserted by the positive human legislature, but "any act . . . to repeal . . . or to narrow its operation . . . will be an infringement of natural rights." In this passage is embodied that fundamental principle which limits and defines the powers of society in enacting human legislation. It is a challenge to that legal positivism which, by excluding and eliminating the eternal obligation of Natural Law, brought about the destruction of law in our time. This positivism, an outgrowth of the declining 19th century, does not recognize any other law but that imposed by the stronger, be it a majority of the people, or the lust of a single leader. It admits no limits for either one established by moral principles. In the eyes of this doctrine, only positive law counts, nothing else. There are no principles which are sacred and immutable. Sufficient and effective force can impose everything "lawfully" on citizens and subjugated alike. There is no safety at all.

Jefferson's bill points in another direction: the obligation of human lawmakers to respect the limits of authority of legislature, which, though established by Natural Law to regulate in harmony the activities of the social body, must act in accordance with Natural Law. Only from such compliance does our duty to obey the true human law arise. There is a law which is strictly based on these principles, the Law of the Church.[141]

[141] Rudolf Köstler, "Der Aufbau des katcholischen Kirchenrechtes" — *Zeitschrift für Öffentliches Recht* [*ZOR*], vol. VI (1927), pp. 479 seq.; Divine

That these principles also apply to the law of states is testified by Jefferson in his famous bill. We hold, that this official endorsement is equal in political and legal significance to the intended purpose of the bill.

It may seem to be a contradiction to what we said in connection with the refusal to accept—instead of the right of religious freedom—the grace of tolerance when we approve Vermeersch's remark that the bill "in its preamble . . . enumerates so to speak, all the reason for tolerance."[142] The preamble is to begin with, the solemn manifestation of a people's belief in Almighty God, "being Lord both of body and mind." As mind is created free, any coercion of conscience is energetically rejected, and a lengthy discussion of ways and means by which men may assume "dominion over the faith of others" still breathes the air of revolutionary tension. It excludes, further on, any interference by the state which may either affect the civil capacities of the citizens or restrain the profession or propagation of religious opinion, unless "principles break out into overt acts against peace and good order", and eventually asserts "that truth is great and will prevail if left to herself."

If we try to sum up the preamble, the following essential points have to be stated: The right of freedom to worship God according to the dictates of the "free mind" demands that man must be at liberty in exercising his religion. This demands from the state and from fellow citizens, the safeguarding of this right, and respect for a man's religious faith. It excludes coercion and discrimination. The state's duty to maintain peace and order, a natural duty resulting from the latter's purpose to meet its human ends, is the negative guarantee of the true right of religious freedom. In other words, religious liberty needs also toleration, not from above as a "grace", but mutual toleration from fellow members of Society, as the duty corresponding to the natural right of religious freedom. It is the same "mutual duty of all" which is

or Natural Law can only be "declared," but not established, in contradistinction to human law, which is established by the competent human authorities.

142 Arthur Vermeersch, S.J., *Tolerance* (1912), p. 206[5].

spoken of in the aforementioned article 16 of the Virginia Bill of Rights.[143]

There is no doubt but that the bill had received a very personal accent from its author, an accent which was, by no means, lost through the incidents of minor changes, inflicted by the amendments. The bill is a recording of those ideological principles which constituted a predominant part in Jefferson's creed and philosophy. It would be going far beyond the limits of our particular inquiry to add another speculation whence exactly Jefferson's philosophy came.[144] An atmosphere of philosophic inquiry had already existed among educated people in Virginia before the Revolution, a mood which was even intensified by it, spreading ultimately among all

[143] From this point of view, the proposed amendment to insert article 16 in the preamble (see p. 208), was very logical, but the opponents of the amendment were probably too much afraid that any reference to the idea of tolerance might be explained, later on, in the detested meaning of "grace."

[144] Becker, *loc. cit.*, pp. 61 seq., pp. 77 seq.; cf. also Johnson Brigham, "Jefferson on Christianity and the Common Law." *Green Bag*, XII (1900), pp. 441 seq.; Gilbert Chinard, *Jefferson et les idéolgues* ... (1925); *idem*, *Thomas Jefferson, the Apostle of Americanism* (1939); Herbert Croly, *The Promise of American Life* (1909), pp. 17 seq., pp. 44 seq.; W. M. Gewehr, *The great awakening in Virginia 1740-1790* (1930); Anna Louise Henne, *Die staatsrechtlichen Anschauungen Thomas Jeffersons* (1934); Gaillard Hunt, "Virginia declaration of rights and Cardinal Bellarmine," *Catholic Hist. Review*, III (1917), pp. 276 seq.; *idem*, "James Madison and Religious Liberty," *Annual Report of the Amer. Hist. Ass'n*, I (1901), pp. 163 seq.; R. G. H. Kean, "Thomas Jefferson as a legislator," *The Virginia Law Journal*, XI (1887), pp. 705 seq.; John Carlisle Kilgo, *A Study of Thomas Jefferson's religious belief* (19—); Harold William Landon, *Thomas Jefferson and the French Revolution* (1928); John Leland, *The rights of conscience inalienable, and therefore religious opinions not cognizable by law* (1——); M. M. Mangasarian, *The religion of Washington, Jefferson* ... (1907); Hastings Lyon, *The Constitution and the Men who made it* (1936); A. C. McLaughlin, *The Foundations of American Constitutionalism* (1932), p. 70; Moorhouse I. X. Millar, S.J., "The Philosophy of the Constitution," *Addresses in Commemoration of the Sesquicentennial of its signing* (1938), pp. 17 seq.; David Schley Schaff, *The Bellarmine-Jefferson legend* (1927); Gustav Adolf Salander, *Vom Werden der Menschenrechte* (1926); Thomas R. Slicer, "Thomas Jefferson and the Influence of Democracy upon Religion," *Pioneers of Religious Liberty in America* (1903); J. W. Wayland, *The political opinions of Thomas Jefferson* (1907); Charles M. Wiltse, *The Jeffersonian Tradition in American Democracy* (1935); C. H. Witt, *Jefferson and the American democracy* (1862); Edward Channing, *The Jeffersonian System* (1906); Elbert D. Thomas, *Thomas Jefferson, World Citizen* (1942).

classes.[145] As in so many other fields, here, too, Jefferson was a true son of his time. His bent for philosophy is well known,[146] and the tendencies of his ideology unmistakably traced in the history of his life. In summing up Jefferson's personality, Becker [147] points at "his clear, alert intelligence, his insatiable curiosity, his rarely failing candor, his loyalty to ideas, his humane sympathies", yet he feels "that his convictions, his sympathies, his ideas are essentially of the intellect, somehow curiously abstracted from reality, a consciously woven drapery laid over the surface of a nature essentially aristocratic, essentially fastidious, instinctively shrinking from close contact with men and things as they are."

Brought up in the era of that particular Enlightenment which had its roots in Western Europe, but had become American in many ways,[148] Jefferson's approach to religion and philosophy was purely rationalistic. He was by far not the man to establish a new philosophical system. "Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before, but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent . . . Neither aiming at originality of principles or sentiments, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind . . ." [149] However, he was the man to pursue, even sometimes with radical zeal, the effectuation of those current principles which he held true and to be self-evident. If the Declaration of Independence was a declaration against political tyranny, his Statute of Religious Freedom may be called the correlative Declaration against the suppression of free mind and conscience. "The error seems not sufficiently eradicated, that the operations of

145 Eckenrode, *loc. cit.*, p. 111.

146 *Writings*, IV, p. 20; XI, p. i.

147 Becker, *loc. cit.*, p. 219.

148 Becker, *loc. cit.*, pp. 77 seq.; Millar, *loc. cit.*, p. 20.

149 *Writings* (ed. 1869), VII, p. 407.

the mind, as well as the acts of the body, are subject to the coercion of law. But our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others . . . Reason and free inquiry are the only effectual agents against error. Give a loose to them, they will support the true religion by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error, and of error only . . . It is error alone which needs the support of government. Truth can stand by itself. Subject opinion to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity. But is uniformity of opinion desirable? . . . Reason and persuasion are the only practicable instruments! " [150]

Jefferson was by no means anti-religious. His belief in God, his rationalistic creed, was manifested in many ways.[151] On the other hand, he was not free of prejudice,[152] and sometimes inclined to exaggerating partiality in his judgments. He held that the true teachings of Christ had been destroyed by sectarianism and religious slavery; and that ecclesiastical tyranny, using the power of the state, had attempted to subjugate the free mind of man and was eager to build up a wall between God and man.[153] Jefferson's opposition, his anti-

[150] *Writings*, II, pp. 221-223.

[151] *Writings*, VI, pp. 258-261; XIV, pp. 197-198; XIII, pp. 253 seq.; XV, p. 60, p. 100, pp. 203, 204, pp. 408-410, p. 426; XVI, p. 281; XVII, pp. i-xi.

[152] Becker (*loc. cit.*, p. 30): " a strong antipathy to kings and priests predisposed Jefferson and Rousseau, as it predisposed Locke . . . "

[153] " In every country and in every age, the priest has been hostile to liberty. He is always in alliance with the despot, abetting his abuses in return for protection to his own. It is easier to acquire wealth and power by this combination than by deserving the purest religion ever preached to man . . ."—*Writings*, XIV, p. 119. Cf. *Writings*, XV, p. 406, p. 426; XIV, pp. 233-234; Bruce, *Hist. Univ. Virginia, loc. cit.*, pp. 18-19.

clerical attitude, was not only an outgrowth of the contest between the Establishment and the dissenters in Virginia. It was not only the result of bitter feeling against his critics.[154] It was a well established and genuine antipathy against any kind of ecclesiastical organization.[155] His concept of the church was based on Locke,[156] regarding it as a purely human institution, far from being of Divine foundation, and not essential to religion. Religion was to him "a matter between our Maker and ourselves."[157] He preferred to be "of a sect by myself",[158] for he was satisfied with the way his reason, the only judge of true religion,[159] was guiding him towards truth which eventually must prevail.[160]

Notwithstanding his criticism in this direction, and his pointed separation from active church life, he insisted on being regarded as a Christian, but not as accepting revelation, the mystery of faith, or the need of devotion. It is as the rationalist who endeavors to exclude any emotion from his restless search for truth. In his later years he is working on a "wee-little book" which he calls "the Philosophy of Jesus." "... it is a paradigma of His doctrines, made by cutting the texts out of the book, and arranging them on the pages of a blank book, in a certain order of time or subject. A more beautiful or precious morsel of ethics I have never seen; it is a document in proof that I am a real Christian, that is to say, a disciple of the doctrines of Jesus, very different from the Platonists, who call me infidel and themselves Christians..."[161] The quest for the true understanding of Christ's moral teachings was one of his sincere labors. In his correspondence with

[154] Cf. *infra*, p. 223.

[155] *Writings*, X, pp. 174-175.

[156] A society of men, voluntarily banded together to offer public worship to God; cf. Vermeersch, *loc. cit.*, p. 200.

[157] *Writings*, XII, p. 237; XVI, p. 281.

[158] *Writings*, XV, p. 203.

[159] *Writings*, XIV, pp. 197-198.

[160] Preamble.

[161] *Writings*, XIV, p. 385.

Dr. Priestley he asserted that Christ's " system of morality was the most benevolent and sublime probably that has been ever taught, and consequently more perfect than those of any of the ancient philosophers." [162]

Human society must be based on true moral principles.[163] Besides these principles which are pre-existent and independent of temporary norms of human society, he held " that the purposes of society do not require a surrender of all our rights to our ordinary governors; that there are certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly encroaching on, if submitted to them; that there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right, which yet the governing powers have ever shown a disposition to weaken and remove. Of the first kind, for instance, is freedom of religion; . . ." [164] He clearly distinguishes between the changeable laws of the state and the unchangeable " inherent and unalienable rights of man ".[165] " No society can make a perpetual constitution, or even a perpetual law." [166] This is a maxim which he kept in mind throughout his life. It finds its solemn expression in the final passages of the Act for establishing religious freedom.

These are the principles which supplied the ideological motives of his bill. Liberty is one of the fundamental and inalienable rights of man, one of the three *cardinalia* of the Declaration of Independence: life, liberty and the pursuit of happiness. The right of religious liberty, therefore, guarantees the foremost principle of liberty, and " no provision . . . ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority." [167]

[162] *Writings*, X, p. 375; cf. X, pp. 378 seq.; XV, pp. 244 seq.

[163] *Writings*, XIV, pp. 139 seq.

[164] *Writings*, VIII, pp. 112, 113; cf. III, p. 235.

[165] *Writings*, XVI, p. 48.

[166] *Writings*, VII, pp. 459 seq.; cf. Jefferson's law book list in Bruce, *Hist. Univ. Virg.*, I, p. 17.

[167] *Writings*, XVI, p. 332.

5. "The Great and Interesting Question"

Jefferson's bill for establishing religious freedom was a challenge to his time. It is obvious that this Declaration of Religious Independence, a momentous achievement in a momentous time, could not pass into history without meeting the rejoicing admiration of its adherents and the vehement condemnation of its opponents. Bitter controversies went on till the old age of its author. He was denounced as being a French infidel, an atheist, a communist. New England pointed at the anti-religious statesman from the South, while others praised the liberator of true religion. Jefferson's writings, his letters and addresses, reflect both these tendencies.[168]

We know that the principles of Jefferson's system were no new inventions, but, being applied by a statesman of so wide an influence to the social origins of this nation, they became "Jeffersonian" in its strictest sense. And, as critics and friends of the Jeffersonian System still continue to occupy separate camps, the merits and results of his feats in the development of the American way of life are either in the spotlight of praise or in the shadows of condemnation. The bill forms an indispensable part of the Jeffersonian System. It is true that one of its cardinal principles is, "no government without the consent of the governed", but besides these limitations inherent in the will of the members of the society, there is the impassable barrier of the unchangeable Natural Law, established by the Creator of mankind, innately in the conscience of man. Natural Law—even in the rationalistic sense of Jefferson—is not merely a physiological force but a true law, dependent on personal will. Consent of the gov-

168 *Writings*, X, pp. 174-175, p. 305; XII, p. xvi; XIII, p. 253: "They wish it to be believed that he can have no religion who advocates its freedom." XV, pp. 60, 61, pp. 408-410; XVI, p. 281, p. 332; 29 V 173 (for New England attacks against Jefferson, and the bill); cf. also John Swanwick (anonymous), *Considerations on an Act of the Legislature of Virginia* (1786); *"Americanus," Address to the People of the U. S.* (1800); *"Marcus Brutus," Serious Facts opposed to "Serious Considerations," or, the Voice of Warning to Religious Republicans* (1800); John M. Mason, *The Voice of Warning to Christians on the Ensuing Election of a President of the U. S.* (1800).

erned and the limits of Natural Law, these are the maxims we have to keep in mind in judging Jefferson's case, and we hold that these are the true elements of true Jeffersonianism, and not the decadent doctrine developed under the influence of the positivism of the 19th century.[169]

The problem of religious freedom had been settled in Virginia, but it was not at once settled in the same way by all the founding states.[170] No power has been delegated to the National Government by the states with regard to a general settlement of this question.[171] The Constitution excludes religious tests "as a qualification for any office or public trust under the U. S." [172] The First Amendment rules that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." But there is no similar prohibition in the National Constitution against the governments of the several states.[173] However, the principle of religious freedom is adopted generally, "since the Congress can make no law respecting the establishment of religion nor prohibit the freedom of religious worship, all persons have the free and unlimited right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine, which is in keeping with the laws of morality and property, and which does not infringe personal rights." [174] As we know from history, it needed the endeavors of generations to reach in practice the high level which the nation is enjoying today.[175]

[169] Cf. Becker, *loc. cit.*, pp. 224 seq.

[170] Herbert Wright, "Religious Liberty under the Constitution of the U. S.," *Virginia Law Review*, XXVII (1940), pp. 75-87, p. 77: e. g. the New Hampshire Constitution of 1792 provided that no person can be a representative (Part II, § 14), senator (§ 29), governor (§ 42), or councillor (§ 61), unless he is "of Protestant religion." The South Carolina Constitution of 1778, Arts. III, XII and XIII contained a similar provision. Art. VI of the Georgia Constitution of 1777 provided that representatives "shall be of the Protestant religion." Cf. also Cobb, *loc. cit.*, pp. 510 seq.

[171] *Writings*, XVI, p. 325.

[172] Article VI, c. 3.

[173] Wright, *loc. cit.*, p. 79.

[174] Wright, *loc. cit.*, pp. 80, 81; cf. Francis H. Heller, "A turning point for religious liberty," *Virginia Law Review* (1943), pp. 440 seq.

[175] Cobb, *loc. cit.*, pp. 520 seq.

The problem of religious freedom has been an American problem from the outset of this nation's history. Plymouth; the theocracies of Massachusetts, New Haven, Connecticut and New Hampshire; the noble statutes of Maryland, Rhode Island, and Pennsylvania; the Establishments of Virginia, the Carolinas, Georgia, New York and New Jersey; what variations of freedom and tolerance, persecution and intolerance are written in the history of these states.

But it is not solely an American problem. From the cradle of our Christian civilization, mankind has been striving and suffering for the innate right to worship God. The Roman Empire, at the time of Christ, tried to solve the problem by absorbing the religions of the conquered nations into the Roman orbit, thus, so to say, admitting the various national gods into the heaven of Roman paganism. This toleration of particular cults, however, was restricted by imposing the unconditional worship of the Roman gods upon everybody living within the Empire.[176] The Christians could not submit to this demand. They asked for the free exercise of their creed according to the teachings of Christ, otherwise fully recognizing the authority of the state as that of the civil ruler.[177] For three hundred years, Christianity took up the greatest and most heroic struggle for the religious freedom which was eventually achieved under the reign of Constantine the Great in 313. The so-called "Edict of Milan"[178] is the first and monumental charter of religious liberty, granting to every individual the freedom of worship according to the discernment of his reason.[179] The successors of Constantine abandoned later

[176] Erwin Melichar, "Das Problem der religiösen Freiheit," in *ZOR*, XVIII (1938), pp. 546-640, esp. pp. 570-571; Johannes B. Sägmüller, *Lehrbuch des katholischen Kirchenrechts*, I, (1925), pp. 64 seq.; Vermeersch, *loc. cit.*, pp. 110 seq.

[177] Melichar, *loc. cit.*, pp. 565-566, 588.

[178] For a survey of the disputed question of the so-called Edict of Milan, cf. Melichar, *loc. cit.*, pp. 577 seq.; also Sägmüller, *loc. cit.*, I, pp. 65 seq., p. 273, p. 445.

[179] Eusebius X, 5, 2 seq.; Melichar, *loc. cit.*, p. 631.

this individualistic principle by arrogating to the civil authority the legislative power *in ecclesiasticis*.[180] Since then, no state based on the traditions of our civilization has ever been willing to disclaim unconditionally this authority. It has been maintained throughout all the centuries with varying intensity. The Reformation translated it into the formula of " cuius regio, eius religio " which was upheld by the Westphalian Peace Treaty of 1648, following the Thirty Years War.[181] The state's authority in religious matters was a principle of the English system,[182] of the Enlightenment,[183] of the French Revolution, of the 19th century. It has not been abandoned in our days.[184]

The extent to which the civil authority interferes with the worship of God, if reduced to terms of legal philosophy, reveals the following antipodes: Complete religious freedom, restricted only by the demands of morality and Natural Law on the one side, and complete intolerance on the other. Between these two extremes there is the broad field of tolerance. Among all the rights of mankind, the right to worship God ranks the highest. It is the correlative to the duty we owe our Maker. It is, in very truth, a supra-national, but also an individual right,[185] for the state has no power with regard to man's soul. The state's interest in man's relation to God can exist only insofar as the manifestation of this relation is concerned, namely that the exercise of worship is kept within the limits of moral principles and Natural Law. Religious freedom does not mean that the civil authority has to endure or protect human sacrifice, or man-eating, or other expressions of abuse in violation of morality or Natural Law. It is the obli-

[180] Sägmüller, *loc. cit.*, I, pp. 67 seq.

[181] Sägmüller, *loc. cit.*, I, pp. 93 seq.; Vermeersch, *loc. cit.*, p. 17.

[182] K. Rothenbücher, *Die Trennung von Staat und Kirche* (1908), pp. 29 seq. Cobb, *loc. cit.*, p. 55, p. 66.

[183] Sägmüller, *loc. cit.*, I, pp. 96 seq. (literature), p. 275, p. 449.

[184] E. Westphalen-Fürstenberg, *Das Problem der Grundrechte in den Verfassungen Europas* (1935).

[185] Westphalen-Fürstenberg, *loc. cit.*, p. 171.

gation of the state to lead men toward happiness, that human happiness which can only be reached if we are enabled to prepare, while on earth, for our supernatural end, everlasting bliss. The state, a natural society, must be based upon the principles of ethics, otherwise it cannot fulfill its purpose. If based upon them, religious freedom finds its place within this sphere.

The postulate of religious freedom, therefore, is the demand that the positive norms of the civil society shall not hinder any manifestation of religion, duly exercised within the limits of the natural moral order.[186] The same postulate, as addressed to the authority of the state, must be directed towards its members. It imposes on all, the authority as well as the members, the obligation of mutual toleration. In this sense, tolerance is no grace, no impunity granted to evil,[187] but a natural duty corresponding to the natural right of religious freedom. It excludes coercion of conscience,[188] and restricts interference to the maintenance of peace and order.[189] The duty of maintaining peace and order includes, eventually, the protection of citizens in the fulfillment of their religious obligations.

The history of Christianity is full of honest proofs of earnest endeavors to "render, therefore, to the Caesar the things that are Caesar's, and to God the things that are God's",[190] to enable man to fulfill in harmony his duties both to God, and to his fellow men in society. Among these endeavors, Jefferson's bill has a well merited place.

The bill was a brain child of the philosophy of the 18th century. We recognize two very significant tendencies of the era of Enlightenment, assuming two distinct forms and resulting

186 Westphalen-Fürstenberg, *loc. cit.*, p. 176; Melichar, *loc. cit.*, pp. 610 seq. (with critical survey of various doctrines, including those of the Canonists Gross and Hussarek, Austrian Verfassungsgerichtshof, Westphalen-Fürstenberg etc.)

187 Vermeersch, *loc. cit.*, p. 5 seq.

188 Cf. Theodoric to the Jews of Genoa, in Cassiodor, Var. II, 27: "Religionem imperare non possumus, quia nemo cogitur, ut credat invitus."

189 Melichar, *loc. cit.*, p. 600.

190 St. Matthew, XXII, 21.

in two distinct doctrines. The one promoted the welfare of the state, the other restricted the duty of the state to general supervision.[191] The first is represented by the so-called "Absolutism", especially that of Austria and Prussia; the latter by the American and French Revolution. Each of these countries represented one or the other of these two very characteristic types, and in each we find an attempt to solve the problem of religious freedom. The Austrian emperor, Joseph II, the "crowned revolutionary", and the "father of Josephinism", issued in 1781 his famous "Toleranz Patent" which paved the way toward the free exercise of religion for non-Catholics.[192] In Prussia, Frederick William II's minister Wöllner enacted his "Wöllnersches Religionsedikt" in 1788.[193] The French Declaration of Rights of 1789 and the Constitution of 1791 proclaimed the liberty of conscience,[194] and we know of the achievements of the American Revolution. Only two states continued in their adopted tendencies: Austria, where the Toleranz Patent became the stepping stone of further legislative and constitutional acts, and America. France turned to religious intolerance and persecution as early as 1793, and Prussia abolished her Edict in 1797.

Today, Jefferson's bill is as actual as it was in 1786. It belongs to the most precious accomplishments of the American Revolution, but its basic principles were founded deeper: they belong to the Christian inheritance of this nation. While the French revolutionaries broke as completely as they could with Christianity, the American Founding Fathers delved deeper into its authentic sources.[195] Protestant men like Jefferson or

[191] Bruce, *Hist. Univ. Virg.*, I, p. 11; cf. the interesting reference to the European development in the Surry petition in Eckenrode, *loc. cit.*, p. 112.

[192] There were in fact several "Toleranz Zirkulare," dealing with this problem; cf. G. Frank, *Das Toleranzpatent Kaiser Josephs II* (1882). The value of the achievements, the tendencies, etc. of Joseph II's attitude toward religion is still disputed, and sometimes, unfortunately, very much misinterpreted. Literature in J. R. Kusej, *Joseph II und die äussere Kirchenverfassung Inner-österreichs* (1908), and Sägmüller, *loc. cit.*, I, pp. 99 seq., p. 274, p. 450.

[193] Melichar, *loc. cit.*, p. 551 (text), p. 597.

[194] Vermeersch, *loc. cit.*, p. 218.

[195] Leo XIII, "*Longinque Oceani*," Jan. 6, 1895, on Catholicity in the United States, and Leo XIII, "*Libertas Praestantium*," June 20, 1888, on human

Madison were separated from the discipline of Rome, but they had not severed relations with the sources of Christianity. Thence derives the basic value of the principles of the bill, and its outstanding actuality in our time. "In reviewing the history of the times through which we have passed, no portion of it gives greater satisfaction, on reflection, than that which presents the efforts of the friends of religious freedom, and the success with which they were crowned. We have solved by fair experiment, the great and interesting question whether freedom of religion is compatible with order in government, and obedience to the laws. And we have experienced the quiet as well as the comfort which results from leaving every one to profess freely and openly those principles of religion which are the inductions of his own reason, and the serious convictions of his own inquiries." [196] With persecutions of millions because of their creed, and the destruction wrought in human society and family life, the desire for a return to the true principles of Christianity, and for the restoration of the Natural Rights of Mankind, has become the outstanding peace aim. "He who would have the star of peace shine out and stand guard over society should cooperate for his part in giving back to the human person the dignity given to it by God from the very beginning; . . . He should uphold respect for the practical realization of the following fundamental personal rights: . . . the right to religious formation and education; the right to the worship of God in private and public and to carry on religious works of charity; . . . the right to free choice of a state of life, and hence, too, of the priesthood or religious life . . ." [197]

One of the battle cries of the French Revolution whose echoes could be heard throughout the 19th century, and is still heard today, was that of "separation of church and state." This cry for separation was in fact a cry for separation from

liberty; cf. Robert J. White, "The Constitution and Papal Encyclicals of our times," *The Constitution of the U. S., loc. cit.*, pp. 65 seq.

[196] *Writings*, XVI, pp. 320, 321.

[197] Pius XII, Christmas Message 1942.

Christianity, for suppression of religion. It has a quite different meaning from what Jefferson had in mind when he urged the disestablishment of the Anglican Church in Virginia. We Catholics know that the Church is a Divine institution. Both the Church and the State are perfect societies. "Both societies are of God. Both authorities are from God."[198] Both are independent of each other. Both have a very clearly determined and specific purpose. There is no need for legislation *in ecclesiasticis,* executed by the state. It is necessary, however, that the autonomous spheres of both be honestly recognized.[199] What we need today is the tie afforded in the personality of the Christian citizen who is free in the fulfillment of his obligations toward the Church and the State, guaranteed by the harmonious collaboration of both. The "pax Christiana" is founded on these two pillars "Pax sit Christiana, universalis, perpetua, veraque et sincera amicitia inter Sacram Caesaream Majestatem Domum Austriacam", and the rulers of Europe, thus begins the document of the Westphalian Peace.[200] It was an attempt to restore peace between the divided Christian nations of Europe, but it was no truce of God. "If the freedom of religion, guaranteed to us by law in theory, can ever rise in practice under overbearing inquisition of public opinion, truth will prevail over fanaticism, and the genuine doctrines of Jesus . . . will be restored to their original purity. This reformation will advance with the other improvements of the human mind, but too late for me to witness it."[201]

In rendering our grateful esteem to the author of the Statute of Virginia for Religious Freedom, let us hope that it may be ours to be witnesses of this confident desire. It is today's more than ever.

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[198] Edward Roelker, "The Church," *Ecclesiastical Review* (1942), p. 268.

[199] Cf. Leo XIII, "*Diuturnum illud,*" June 20, 1881; Leo XIII, "*Immortale Dei,*" November 1, 1885.

[200] Art. I, *Instrumentum Pacis Osnabruggensis - Monasteriensis* (*IPO-IPM*).

[201] *Writings,* XV, p. 288.

THE POWER TO ENACT INVALIDATING LAWS

AS mentioned in an earlier[1] article there has never been any serious challenge of the general right of the legislator to enact invalidating laws. The need for such laws was so evident that the power necessary so to legislate was never denied the legislator. Besides, there is almost unanimity among the canonists of earlier and present days in giving the reasons why invalidating laws are necessary. Reiffenstuel,[2] for instance, says that the power to make invalidating laws is as necessary as any other power to forbid an action or to oblige a subject. Thus, he says, there is a potent means to obviate the activities of the malicious. This, according to Reiffenstuel, is necessary for the public good. Suarez[3] has practically the same reasons. Suarez proceeds to show how the common or public good is served by the use of invalidating laws. His demonstration is sound and is worthy of repetition.

Suarez begins his demonstration by showing that there is no contradiction between natural liberty and the use of invalidating laws. Whatever liberty man has exists subject to the society of which he is a member. Moreover, liberty itself can be curtailed, and, therefore, the liberty to act can be controlled. That such control, even to the extent of invalidity of acts, must at times exist is proven by experience. It is, then, the duty of the legislator to invalidate certain acts whenever there is fear of public harm. It is likewise the duty of the legislator to establish at times certain formalities before an act can be considered valid.

[1] Cf., THE JURIST, p. 38. As noted there, this is the second of a series of four articles on invalidating laws.

[2] Reiffenstuel, *Ius Canonicum Universum* (Parisiis, 1864), tit. I, *De constitutionibus*, § XI, n. 239.

[3] Suarez, *Tractatus de Legibus ac Deo Legislatore*, Lib. V, cap XIX, n. 1; for the invalidating force of natural law, cf. Suarez, *o. c.*, Lib. II, cap. XII.

Suarez has no illusion that invalidating laws are not onerous. He admits inconvenience and freely concedes that such laws are a restriction.

The right of the Church to impose restrictions on the liberty of her subjects is best demonstrated in a discussion of the Tridentine form of marriage. In the Council of Trent a universal law, applicable where the law was promulgated, was enacted demanding at marriage the presence of the pastor and witnesses.[4] In the discussion leading to this enactment it was suggested that a person's natural right to marry would be unduly curtailed if the formalities were so stipulated as to render a marriage invalid without them.[5] It was also suggested that the power to invalidate clandestine consent was theologically impossible. It will be useful to examine the reasons alleged why the Church could not invalidate acts. This examination will throw light on what fundamental power the Church possesses over the actions of her subjects and will demonstrate how the relationship between the Church and the faithful should be considered.

The first argument proposed against the use of invalidating laws in regard to the form of marriage maintained that marriage was a natural contract where even clandestine consent sufficed. That such consent did suffice before the Council of Trent is freely admitted by the Council itself, although clandestine marriages had been disapproved. Since clandestine consent had been sufficient, it was argued that nothing more could be required for the validity of marriage. Any solemnity or formality could not be demanded by the force of an invalidating clause. Any attempt to attach such a clause to the natural marriage contract involved an alteration of natural law.

The reply to this argument demands a distinction in the precepts of natural law. Some precepts of natural law command, and others permit. That the Church has no power to

[4] Conc. Trid., sess. XXIV, *de reformatione matrimonii*, c. 1.

[5] Sanchez, *Disputationum de Sancto Matrimonii Sacramento libri decem*, lib. II, disp. IV, n. 1.

forbid an act commanded by natural law is conceded, but the Church has power to restrict an act which would be only permitted and not commanded by natural law. It is certainly true that a clandestine marriage is permitted by natural law, but it is equally true that such a marriage is not commanded by natural law. Many rights are fundamentally supported by natural law which are seldom or never exercised because of the social restrictions of society. These rights could be exercised except for the restrictions of positive law. Yet, no injustice is inflicted on a person who must, in order to live in society, surrender some rights which he could, if he lived outside of society, exercise.[6]

The right to clandestine marriage is unquestionably something permitted by natural law. Mutual consent to marriage is fundamentally sufficient. But, since marriage is a contract, it involves certain relationships which are founded on natural law but are regulated by positive law. Such regulation is exemplified in the Tridentine form of marriage. In a word, then, since a clandestine marriage is not commanded but only permitted by natural law, it can be declared invalid by an authority authorized to regulate the acts of its subjects.

The right of the Church to invalidate the natural consent of marriage is at least parallel to the right of the State to invalidate contracts entered into without due solemnities.

The State considers itself competent to declare certain acts of purchase and sale invalid. The same competence is felt in the law requiring solemnities for the making of valid instruments. No one will deny the State the right to control and regulate the actions of its citizens even though such control and regulation involve the enactment of invalidating laws. Yet, each time an invalidating law operates it denies validity to an act which would be valid in natural law. In a word, something permitted by natural law is denied by the State.

[6] For a modern treatise on the power of the Church to make invalidating laws in regard to marriage, cf. Gasparri, *Tractatus Canonicus de Matrimonio* (*editio nova,* Typis Polyglottis Vaticanis, 1932), v. I, pp. 137-145; cf. cc. 1038-1041.

The second argument proposed against the power of the Church to invalidate the natural consent to marriage was partly theological. It was maintained that before the Council of Trent clandestine consent constituted the matter and form of the sacrament of matrimony and that any solemnity added to this natural consent involved a change in the matter and form of the sacrament. In other words, natural consent had been sufficient before the Council of Trent, but afterwards was insufficient for marriage. Hence, the matter and form of marriage had been altered. But, it was further maintained, the Church had no power to alter the matter and form of a sacrament. Therefore a law invalidating natural consent was beyond the power of the Church.

The reply to this argument insists again on the contractual nature of marriage. The contract which results from the expression of consent is not entirely in the hands of the contracting parties. Rather, this contract is mostly within the jurisdiction of the authority which regulates it. It is for this authority to establish norms according to which valid consent can be expressed and according to which a contract will be recognize. With this in mind, no alteration of the matter and form of the sacrament of matrimony is involved. Mutual consent is still required, but a specified manner of expressing this consent is demanded. It is this manner of expressing consent which is altered. The actual matter and form of the sacrament are not affected. Before the Council of Trent no solemnity was demanded for validity of marriage, and natural consent sufficed. After the Council of Trent no change in the nature of the necessary consent was introduced. Consent as such remained, but it had to be expressed in the presence of the pastor and witnesses. It is improper to designate the alteration of the manner of expressing consent as an alteration of the matter and form of the sacrament of matrimony. Hence, there is, in the Tridentine form of marriage, no exercise of power beyond the competence of the Church.[7]

[7] A complete discussion of the Church's right to invalidate marriage consent can be read in Sanchez, *ibid.*, nn. 1-7, 10. Sanchez also writes at length of the

This doctrine of the earlier canonists has continued to the present day. Canonists who pause at all to offer reasons why the legislator can enact invalidating laws say practically the same thing as was said earlier. Van Hove,[8] for instance, says it is the common practice of Church and State to enact invalidating laws because of their occasional necessity. Van Hove, too, like Suarez, sees no contradiction between natural liberty and the use of invalidating laws. He maintains correctly that rights are subject to the Church and the State. Van Hove, however, does emphasize that an invalidating law does not act contrary to the law of nature. All right to act from the natural law is conditioned by the use of social authority. In this way an act which would be valid from natural law can be invalid due to the existence of a pertinent invalidating law. This is a clear statement and of tremendous practical importance. There is no doubt that a man frequently considers himself free to act provided he sees no obvious harm to others resulting from his actions. Again, there are many items where a person feels that his action is not really of public interest but rather affecting only himself or his family and friends. Hence, in such circumstances he is unlikely to learn if an invalidating law prevents him from acting legally. He may be entirely unaware that he is legally incompetent to act. Nevertheless an invalidating law can annul his act. Or consider, for instance, a contract made without the required formalities. The Church in the example adduced[9] adopts the civil law. The matter of this contract may not be of public utility, but it must because of the constant danger of fraud be drawn up in a certain way. Lack of required formalities will vitiate the contract. Van Hove, then, succinctly lays down a rule of real importance.

power of the Pope and Bishops and of the power of the State to legislate on matrimonial impediments; cf. *o. c.*, lib. VII, disp. I, II, III. An interesting discussion is found in disp. IV where Sanchez considers the force of custom in introducing invalidities of acts and in abolishing invalidities established by law.

[8] Van Hove, *De Legibus Ecclesiasticis* (Mechliniae-Romae, 1930), n. 153.

[9] Cf. c. 1529.

There is no doubt, then, that the legislator has the power to enact invalidating laws. There is no necessity to offer many arguments to prove this statement. If one considers the broad duty of the legislator to legislate for the common good and at the same time considers the possible carelessness and even fraud that accompany men's actions, the absolute need for invalidating laws will be at once evident. It is true that such laws are not in punishment of actual fraud or other crime, but they are based on the danger of fraud. This danger always exists.[10]

Again, considering the necessity for maintaining public order or considering the propriety of preserving public decency, the need for invalidating laws is equally evident. Certain aspects of public order must be insisted upon for the common good, and certain natural or legal relationships must be respected. It is also to provide for these items that invalidating laws are necessary.

While the power to enact invalidating laws is everywhere conceded, there is also no doubt that custom in time has demanded that the legislator clearly and definitely indicate his purpose to annul acts or to declare persons legally incompetent to act. But this will more properly be considered in a later article.[11]

Further, if the question be asked whether the power to make invalidating laws can be surrendered, it must be answered that such renunciation should be denied.

The need of invalidating laws is constant. Such laws, it is said again, are based on the danger of fraud, on public order and public decency. It is true that individual cases can and do occur where items can be sufficiently provided for without invalidating laws. But these are points of fact and in no way at all destroy the general presumption that fraud may exist, that public order must be maintained, or that public decency must be respected. Certainly, if a valid reason exists why an

[10] Cf. Graf, *Die Leges Irritantes et Inhabilitantes im Codex Juris Canonici*, Paderborn, 1936, pp. 21, 22.

[11] This article will appear in the July issue of THE JURIST.

invalidating law should not be applied, a dispensation should be requested.

The duty of the legislator is to provide for the common good. He must, then, in his laws consider all the circumstances of acts; he must take into account the ambitions and the weaknesses of men. He cannot legislate as if men had no faults or were entirely unwilling to profit by their neighbor's ignorance or simplicity. Further, he must consider everything that has any social implication and provide for possible contingencies. These are constant responsibilities and are discharged by means of law. How, then, could a legislator surrender his right to enact suitable provisions? Fraud, for instance, in an individual case can be considered as non-existent but what of the thousand other cases? It is precisely because of the constant danger of fraud that some invalidating laws are enacted. Parallel reasons exist for other invalidating laws.

A further question arises in regard to the quantity of legislative power necessary to enact invalidating laws. The question is of importance, for there are legislators in the Church who are not endowed with full legislative powers. Does any measure of legislative power suffice? Before this question is answered, a very brief outline of the hierarchical nature of the Church should be made. In this way the various persons who possess jurisdictional and legislative power will be indicated.

By divine law the Supreme Pontiff legislates for the entire Church. There is no section of the Church either in ritual or discipline which is exempt from his law. However, subordinate to this universal jurisdiction is the territorially contained diocese or its equivalent in law.[12] Together with this subordinate division of power there exists in the Church jurisdiction which is not limited to territory.[13] All Ordinaries, both local and religious Superiors in exempt clerical communities possess real jurisdictional power. The religious Superior, however, is

[12] E. g., vicariate apostolic. Cf. cc. 293, § 1, 294, § 1; cf. also c. 198, § 1.

[13] Cf. c. 501, § 1.

controlled not only by the general principles of law but also by the provisions of Canon 501, § 3. There is no necessity to expatiate on the details contained in this canon. All that is intended is to indicate the possession of jurisdiction and to study this jurisdiction to see if it is sufficient to enact invalidating laws.

The first Ordinary to be considered is the Bishop of a diocese. There is no doubt at all that a Bishop's jurisdiction includes the power to enact laws. This is clearly stated in Canon 335, § 1.[14] The only restriction placed on the legislative power of the Bishop is the command stated in the same canon that his power is to be used in accordance with sacred canons. Within this field the Bishop's power is ample and sufficient. His laws are binding.

Further, while his diocese is territorially circumscribed, a Bishop is competent to enact personal laws which will bind beyond his territory. His power, then, is over both territory and persons. From this source no restriction can be deduced which would deny a Bishop the right to enact invalidating laws.

But is there any other reason why this power should be denied? There is nothing in The Code of Canon Law which would support such denial. Canon 1039, § 2[15] cannot be alleged as an instance. This canon does not contemplate a law. It merely provides for a precautionary prohibition. It could be compared to very serious and urgent counsel. The problem considered in Canon 1039 is one that can have serious repercussions in the matter of marriage. Accordingly, a local Ordinary is authorized to forbid a marriage if he has just cause. The canon states other restrictions and then goes on to state that only the Apostolic See can attach an invalidating clause to such a prohibiion. Hence, it is evident that disobedience to the local Ordinary's prohibition would not invalidate the marriage. While the prohibition of the local Ordinary is a serious

[14] "Ius ipsis et officium est gubernandi . . . cum potestate legislativa," etc.; cf. Ryan, *Principles of Episcopal Jurisdiction* (Washington, 1938), pp. 77-144.

[15] "Vetito clausulam irritantem una Sedes Apostolica addere potest."

one, it does not follow that it is to be considered a law. On the contrary, the local Ordinary is authorized to prohibit a marriage only in particular cases. There is no authorization for all cases. This idea excludes the notion of a law. Therefore, Canon 1039, § 2 cannot be alleged as a restriction on the right of the Bishop to enact invalidating laws.

Any comprehension of the actual legislative power of the Bishop will indicate that he must possess the right to enact invalidating laws. The same difficulties and dangers that demand the rule of the universal legislator are in a limited sense found also in the rule of the Bishop. It certainly must be admitted that reasons which would prompt the universal legislator to annul certain acts or to render some persons legally incompetent to act can also be found in smaller jurisdictions. In his own diocese it is the duty of the Bishop to provide for the common good. Under the Supreme Pontiff, he is the legislator who should provide for the needs of his diocese. His office includes the maintenance of public order and the preservation of public decency.

Conceding, then, the right of the Bishop to enact invalidating laws, it is necessary to learn whether this right is in any way restricted.

A Bishop promulgates laws that are either entirely outside the actual text of THE CODE OF CANON LAW or which are particularizations of general laws furthering discipline in his own diocese. Despite its wide range of jurisdiction, THE CODE OF CANON LAW cannot possibly provide for all local conditions and all contingencies. Such provision is left to the work of Bishops in Councils and Synods.

A Bishop is competent to legislate on any matter that is necessary or useful to his diocese. This presupposes that the content of the projected law is in harmony with the purpose of the Church. Obviously, the Bishop has no legislative competence in items foreign to the Church. It is always to be remembered that the Church is a religious organization and not a political faction or party. Naturally, the same limits

demonstrated in public law [16] that affect the universal Church will also restrict the local Ordinary's legislative power. But within his own ample field, the Bishop is competent to legislate. His competence includes any means that are necessary or useful to fulfill the purpose of his law. Therefore, if in the judgment of the Bishop an invalidating clause must be attached to his law, contrary acts will be invalid. In the same sense, a person who is declared by diocesan law unable to act legally is bound by this inability. Again, whenever the Bishop indicates that certain formalities, v. g., in contracts, etc., must be fulfilled before he will recognize an act as valid, these formalities must be fulfilled. As was stated earlier [17] in regard to the concept of invalidating laws, these restrictions and formalities are not penalties. They are aids which the Bishop uses to further good government. They constitute a protection for the people.

Besides legislating on matters entirely outside THE CODE OF CANON LAW, a Bishop may by his own law particularize the general law of the Code. Frequently, THE CODE OF CANON LAW will merely state the broad outline of discipline and leave its narrower application to diocesan statutes. Thus the groundwork for diocesan statutes is already laid, and the Bishop merely adapts the discipline of the Code to the needs of his own diocese.[18]

In regard to such a law is the Bishop competent to attach an invalidating clause? It is not easy to answer the question. On the one hand, the Bishop is making definite use of his legislative power, and, on the other, his law is not matter over which he has full control. Neither item can be considered alone.

There is little aid in history or in contemporary canonical doctrine to guide one toward forming an opinion on the ques-

[16] Cf. Ottaviani, *Institutiones Iuris Publici Ecclesiastici*, v. I, pp. 264-280; cf. also pp. 78-88.

[17] Cf. THE JURIST, pp. 58, 59.

[18] Grandclaude, E., *Ius Canonicum* (Parisiis, 1882), pp. 129-130. "Generatim possunt [Episcopi] determinare ea quae sunt juxta aut praeter ius commune, nihil autem quod sit contra ius illud."

tion proposed. There is, however, a principle of law that will suggest a solution.

Canon 335, § 1 states the fundamental law for the legislative power to be exercised by a Bishop. In this canon such power is to be exercised according to THE CODE OF CANON LAW. We have had occasion to refer to this before, but it is equally applicable here. The restriction placed upon a Bishop in legislating for his diocese extends beyond the mere inability to rule contrary to the actual text of the general law of the Code. The phrase *ad normam sacrorum canonum* includes also the spirit of the law. Therefore, it would scarcely be correct to say that a Bishop could honor the text of THE CODE OF CANON LAW and reject its spirit. Ryan, in his work on the principles of episcopal jurisdiction, says: "His [the Bishop's] legislation *secundum ius* is directed to the adaptation of the higher law to his diocese. The higher law is the superior legislator's mind as to the means of procuring a particular end. In accommodating the higher law to the specific territorial characteristics of his diocese, the Bishop must take cognizance of both the mind of the legislator and the purpose which the superior legislator intends, since both of these must be substantially respected and preserved intact." [19] It is true that Ryan does go on to say [20] that under certain circumstances a Bishop may impose a sanction on his adaptation of the general law, but Ryan does not indicate that he understands an invalidating clause as a sanction. Ryan speaks of penalties. He does not necessarily include invalidating clauses. On the contrary, Ryan later maintains [21] that a "Bishop cannot prescribe conditions for the validity of any matter which the Holy See has regulated without such invalidating provision, unless this power is conceded to him by the supreme legislator." In support of his contention, Ryan cites Benedict XIV.[22]

[19] Ryan, *o. c.*, p. 133.

[20] Ryan, *o. c.*, pp. 133-134.

[21] Ryan, *o. c.*, pp. 138-139.

[22] *De Synodo Dioecesana* (Romae, 1767), lib. 9, cap. 1.

The opinion of Ryan could be immediately adopted if the quotation just made considered every kind of papal enactment. However, this is not clear. Ryan is considering possible episcopal invalidating laws only in respect to something explicitly permitted by a higher authority. In this case, it is obvious that a Bishop cannot restrict permissions granted by the Pope. The difficulty still remains, although the first quotation from Ryan's useful book can throw some light on how a Bishop should legislate. However, if this quotation from Ryan really means that whenever the supreme legislator has in any way legislated on a matter, no inferior legislator can go counter to this legislation. Ryan's statement will indicate that a Bishop cannot attach an invalidating clause to any adaptation of general law. The mind of the legislator is just as compelling in a prohibitory law as in a preceptive or permissive law. His mind must be respected.

It has been said above that the phrase *ad normam sacrorum canonum* in Canon 335, § 1 means more than the mere text of the Code. Hence a general law that permits adaptation to the particular needs of a diocese should show some indication that its provisions, when adopted by the Bishop of the diocese, could be enforced with invalidating clauses. After all, the adaptation of a general law of the Code to the particular needs of a diocese is not matter independent of the Code. Therefore, a Bishop has not full control of this matter such as he would have if he were acting in regard to items not contemplated or expressed in THE CODE OF CANON LAW. Therefore, a Bishop is bound to follow the general outline of the universal law. A Bishop can, then, adapt; he can particularize, but he cannot legislate contrary to the spirit of the universal law which he is adapting or particularizing.

In regard, then, to permissive laws a Bishop can, when the universal law permits such adaptation, place further conditions which he judges necessary or useful for his diocese. Similarly, in regard to prohibiting laws a Bishop can further restrict the actions of his subjects. But in neither case can he enforce his law with an invalidating clause.

This is no essential restriction of the Bishop's power to legislate. In the matter under discussion a Bishop is not the sole judge. He is conceded power to legislate concerning the needs of his diocese, but this is to be exercised according to the principles of law as demonstrated in public ecclesiastical law,[23] and as indicated in Canon 335, § 1. Another possibility of the Bishop's power to enact invalidating laws should be examined. A Bishop can in his own law add penalties to the general law of the Code.[24] This power is not unrestricted, but in a general way a Bishop can urge the observance of the common law of the Church by penalties of his own.[25] Would this power imply the use of invalidating clauses?

There is no doubt that an invalidating clause can be a penalty, but this is not its purpose. Whenever, then, an invalidating clause is actually and demonstrably a penalty it should be considered in this light and not as a clause introduced into the law for the common good. However, an invalidating law such as has been the subject of the preceding pages is not a penalty. Hence, there is no reason to argue that the power to place a sanction implies the power to attach an invalidating clause. The two items are juridically distinct and bear no juridical relationship. It is only exceptionally that an invalidating clause can be construed as a penalty. Sanctions and invalidating clauses are not in the same category. There can be no discussion of the greater or the less in their regard. Both are instruments that a legislator can use to achieve his specific purpose. Should he decide to combine both in protecting the common good and at the same time in punishing a culprit, the legislator is normally competent to do this, but the two items under discussion are not interchangeable or normally conducive toward obtaining the same end. Therefore, it must be said that the power granted to a Bishop to strengthen the general law by his own penalties does not imply

[23] Cf. Ottaviani, *o. c.*, v. I, pp. 460-463.

[24] Cf. Ryan, *o. c.*, p. 133; cf. also Grandclaude (*o. c.*, p. 130) on earlier legislation.

[25] Cf. c. 2247, § 1.

the power to attach an invalidating clause to his adaptation of the general law.

There is one more point to consider regarding a Bishop and an invalidating statute. In some synods a few statutes merely repeat the law of the Code. There is no adaptation intended. Obviously, in the case at hand, the Bishop cannot add anything to the text of the Code either denying permission or inserting inabilities.

The right of the Bishop to enact invalidating laws has been discussed at length not only for its own sake but also because it serves as a model for Ordinaries of territories not yet organized into dioceses but which are considered equivalent in law.

Vicars and Prefects Apostolic are true Ordinaries of the territories assigned to them.[26] They possess the same rights as residential Bishops unless the Apostolic See has made some restrictions.[27] As Ordinaries, then, Vicars and Prefects Apostolic enjoy the right to legislate for their subjects. The Code carries no restriction of this right. Therefore, it must be said that the power of Vicars and Prefects Apostolic is as comprehensive as the legislative power of the residential Bishop.

The description of various uses of legislative power by the residential Bishop is equally applicable here. Where the Vicar and the Prefect Apostolic enjoy full right to legislate, they may attach invalidating clauses to their laws. But, where the Code has already legislated in a general way, the Vicar and the Prefect Apostolic are bound by the spirit of the law. Therefore, in a permissive or preceptive law they cannot demand certain formalities or conditions not contemplated by the supreme legislator; nor in prohibitory laws can they forbid something as null and void when this canonical effect is not discernible in the general law.

Yet it must be understood that Vicars and Prefects Apostolic are not temporary successors in office. They rule as the

[26] Cf. c. 293, § 2.

[27] Cf. c. 294, § 1.

equivalent of residential Bishops and are not subject to the restrictions placed upon temporary successors in office.[28]

Vicars and Prefects Apostolic, however, must immediately upon assuming their office select a Pro-Vicar or a Pro-Prefect. This must always be done unless a Coadjutor with the right of succession has been named.[29] These Pro-Vicars and Pro-Prefects are in point of fact temporary successors in office, yet the whole rule of the territory devolves upon them as canon 309, § 2 indicates. Thus, it could be inferred that Pro-Vicars and Pro-Prefects have entirely equal powers with Vicars and Prefects Apostolic. There is a word added in canon 309, § 2 which does not appear in other canons that treat of vacant and impeded Sees. Canon 309, § 2 gives *totum regimen assumere;* canon 429, § 1 gives *dioecesis regimen;* canon 431, § 1 gives *ad Capitulum ecclesiae Cathedralis regimen dioecesis devolvitur;* canon 432 says *Vicarium Capitularem qui loco sui dioecesim regat.* Thus, all the canons that consider the rule of a vacant or impeded diocese speak in a general way of the interregnum without emphasizing that the rule of the whole diocese passes to the temporary successors. Is this addition of a word in canon 309, § 2 to mean that the Pro-Vicar or the Pro-Prefect can change the law of the Vicar or Prefect Apostolic and add invalidating clauses? Such power would be more extensive than that which is clearly conceded to the Vicar Capitular in canon 435, § 1, but who is also bound by canon 436. This latter canon says nothing should be changed during the vacancy of the See. It is difficult to believe that the legislator intended to grant more power to a Pro-Vicar than he grants to a Vicar Capitular. Both are in point of fact temporary rulers of territories. Both enter upon their offices with the assumption that the Vicar Apostolic or the residential Bishop had adequately provided for the needs of the people.

Moreover, it must be remembered that the office of Pro-Vicar or Pro-Prefect is a temporary arrangement. The reason

[28] Cf. cc. 429-444, where the Code speaks of the vacant and impeded See and of the Vicar Capitular.

[29] Cf. c. 309.

for its existence is the same as that which supports the office of Vicar Capitular. It ought, therefore, to be judged by the same underlying principles that control the action of the Vicar Capitular. This is another instance where the spirit of the law must be considered. Nothing, at least of importance, should be changed during the vacancy of a diocese. The same restriction should bind the Pro-Vicar or the Pro-Prefect. How this restriction is to be considered we shall indicate subsequently.[30]

Another Ordinary whose powers to legislate must be examined is the Apostolic Administrator. There are two kinds of Apostlic Administrators: one is permanently designated; the other is a temporary ruler. The former alone will be considered at this point.

The Apostolic Administrator permanently designated has the same power in law as a residential Bishop.[31] Everything, then, that has been said about the right of a Bishop to legislate applies equally well to the Apostolic Administrator. This Administrator is an Ordinary in his own right and is not dependent on the Bishop of the diocese. In fact, while the Apostolic Administrator is in office the Bishop's power is suspended.[32] This is mentioned because the Apostolic Administrator is not an auxiliary to the Bishop of the diocese. He is an entirely independent Ordinary with whose advent the power of the Bishop of the diocese is suspended. Nor, in regard to the Apostolic Administrator under discussion, are we dealing with a temporary Ordinary. We are dealing with a successor of equal right who obtains his power not by delegation but from the general law of the Code.

Applying, then, the rule of equality in law between the Bishop of the diocese and the Apostolic Administrator, the latter can legislate with invalidating clauses in matters entirely beyond the Code, but he cannot so legislate when he has not full control.

[30] Cf. pp. 249-251.

[31] C. 315, § 1. C. 314, however, provides for particular adjustments.

[32] C. 316, § 1.

A word, too, must be said of Abbots and Prelates *nullius*. These are Ordinaries who rule territories separated from a diocese.[33] According to canon 323, § 1, Abbots and Prelates *nullius* enjoy the same ordinary powers that are possessed by a residential Bishop. Among these powers is, of course, the right to legislate with invalidating clauses, and this right must then be conceded to Abbots and Prelates *nullius*. Naturally the same circumscription of this power as indicated above for Bishops and Apostolic Administrators will also be in force here.

Besides acting alone in their legislative capacity, Bishops, etc., sometimes assemble in plenary and in provincial councils. The local Ordinaries who are to assist in the deliberations of such councils are named in canons 282, § 1, 285 and 286, § 1. No greater legislative power is granted to the Bishops, etc., assembled in such councils than is conceded to Bishops when acting alone. The Code of Canon Law does restrict the power of the individual local Ordinary to dispense from the law of plenary and provincial councils,[34] but it does not grant more power than each Bishop, etc., inherently possesses. The power, then of a plenary and of a provincial council to enact invalidating laws is exactly the same as that possessed by each Bishop, etc. In matters over which the council has full control invalidating laws can be made; in matters where this full control does not exist such laws cannot be enacted.

It is useful here to recall that the approval of the Holy See of the acts of a plenary and of a provincial council does not give to these acts specific papal authority.[35] It may be that some act of a council might attach an invalidating clause to a law not so fortified in The Code of Canon Law. This would not mean that the Holy See has permitted the Fathers of the council to modify the general law. To do this, specific approval would be required, and it is not presumed in the gen-

[33] C. 319, § 1.

[34] Cf. c. 291, § 2.

[35] Cf. Bouscaren, T. Lincoln, S.J., *The Canon Law Digest* (Milwaukee, 1934), cc. 291, 838.

eral approval accorded to the acts of the plenary and the provincial council.

The office of Vicar General should also be examined in regard to invalidating laws. A Vicar General is a true Ordinary in law.[36] According to canon 368, § 1 a Vicar General in a diocese enjoys universal jurisdiction with the Bishop of the diocese provided the Bishop has not reserved certain powers or the Code itself has not demanded a special mandate. This would seem to indicate that a Vicar General could legislate outside of a diocesan synod. As far as legislation in a synod is concerned a Vicar General is unable to act because he cannot summon a synod. This is expressly forbidden him without a special mandate.[37] Further, canon 362 which treats of the synodal legislator uses the word *Episcopus* and not *Ordinarius*. While it is not entirely clear that a Vicar General is forbidden to legislate outside of a synod, it would be contrary to the spirit of the law to concede him such power. If this power is to be denied him, it would be useless to speak of his inability to make invalidating laws. But if this power is really his, he would be subject to the same restrictions as the Bishop of the diocese. It is beyond the scope of this study to investigate and determine the existence of the power of the Vicar General to legislate.[38] All that need be said here is that the Vicar General, if he possesses the power to legislate outside of a synod, cannot attach invalidating clauses to an adaptation of the general law when the latter does not contain such a clause.

Besides local Ordinaries permanently established in office, The Code of Canon Law provides also for the temporary rule of a diocese. Succession is variously determined and will be investigated to learn if temporary successors in office can enact invalidating laws.

[36] Cf. c. 198, § 1.

[37] C. 357, § 1.

[38] An analysis of the power of the Vicar General can be studied in commentaries, e.g., Wernz-Vidal, *De Personis* (Romae, 1923), p. 677-679.

When a residential Bishop loses his office in one of the various ways indicated in THE CODE OF CANON LAW,[39] he is succeeded normally by the Cathedral Chapter.[40] The Cathedral Chapter must within eight days elect a Vicar Capitular.[41] Where a Cathedral Chapter is not constituted, a board of Diocesan Consultors takes its place, and this board elects a Vicar Capitular who is called in the United States an Administrator.[42] There may be circumstances which call for a change in the normal succession, and this change is provided for in canons 355, § 1 and 431. The first of these canons indicates the immediate and complete succession of the Coadjutor with the right of succession. The second of these canons besides admitting the possibility of change in the normal temporary succession indicates that if a Bishop or Archbishop is by special designation of the Holy See to rule the vacant diocese, he possesses the power of the Vicar Capitular. If the succession of the Coadjutor is omitted the temporary succession of other Ordinaries can be considered to be the same thing. There is a difference of persons but not of power. Hence it will be sufficient to consider the Vicar Capitular.

How far does succession in office entitle a Vicar Capitular to legislate? Canon 435, § 1 gives the fundamental law for the power of the Vicar Capitular.[43] In this canon it is stated that the Vicar Capitular enjoys the ordinary jurisdiction of the Bishop except in matters expressly denied him. This is a broad statement, and if considered alone would entitle the Vicar Capitular to make any law concerning which a residential Bishop would be competent. But in the interpretation of laws it is necessary to view the whole subject before an opinion can be rendered. Now in canon 436 there is an old maxim which has great significance. *Sede vacante nihil innovetur.*

[39] Cf. c. 430, § 1.

[40] Cf. c. 431, § 1.

[41] Cf. c. 432, § 1.

[42] Cf. c. 427.

[43] "... ad Vicarium Capitularem transit ordinaria Episcopi iurisdictio ... exceptis iis ... eidem prohibita."

While the application of this rule has largely been centered on the alienation of goods and the restrictions against disposition of the properties belonging to the episcopal benefice,[44] the significance of this rule is broader than its historical meaning. It really means that nothing should be done during the vacancy of a diocese that would change its rule. This is not to say that a Vicar Capitular's power to rule is nugatory. Not at all. But because of the restrictions made in various canons[45] it is evident that much actual power is denied to a Vicar Capitular. Now to legislate is one of the principal rights of the residential Bishop. To attach invalidating clauses to his laws is likewise a right of the residential Bishop in definite circumstances. The Vicar Capitular as successor to the residential Bishop could undoubtedly enact new invalidating laws. This much power is to be conceded to him because he is to rule the vacant diocese.

But where a change in the law is contemplated, one hesitates to assign such power to the Vicar Capitular. Of course, it is fundamental that the Vicar Capitular exists for the government of the diocese, and if a change of law is definitely required for the betterment of the diocese, it would be difficult to deny absolutely the right of the Vicar Capitular to change a law so that it could annul acts or declare persons incompetent to act. If the broad principle of canon 435, § 1 be invoked, this right must be conceded; but if this principle be taken into consideration with the rule laid down in canon 436 the question remains doubtful. Changing the application of a law is a serious thing. It involves a new judgment on what is necessary to protect the community. That urgent necessity may exist in the comparatively brief time of the Vicar Capitular's incumbency may be seriously doubted. Invalidating laws are not the production of but light thought. They are the result of long and profound thought with every considera-

[44] Cf., e. g., c. 1 *de rebus ecclesiae non alienandis*, III, 9 in VI°; S. C. Ep. et Reg. *Pontis Curvi*, 14 June, 1788, *Fontes*, n. 1882.

[45] E. g., cc. 113; 357; 406, § 1; 454, § 3; 455, § 2, 3°; 492; 686, § 4; 893, § 1; 958, § 1, 3°; 1432, § 2; 1487, § 1; 1573, § 5; 1590, § 1.

tion given to the hardship they may at times occasion. To place new burdens during the Vicar Capitular's incumbency seems hardly justifiable. Therefore, while it cannot be proven in the actual text of law that a Vicar Capitular is incapable of adding invalidating clauses to existing diocesan law, it should be said that such power is contrary to the spirit of canon 436. *Sede vacante nihil innovetur.*

These reflections are equally applicable to the temporary succession of Pro-Vicars and Pro-Prefects in missionary countries. Some remarks comparing the offices of Vicar Capitular and Pro-Vicars (Pro-Prefects) were made earlier.[46] Here it is sufficient to reflect that the very idea of temporary succession in law precludes any notion of full control of the powers of one's predecessor. The office of Vicar Capitular and Pro-Vicar (Pro-Prefect) is instituted to continue the regular and normal work of the diocese or mission. To do this work satisfactorily scarcely requires changing particular law so that disobedience to the law will entail invalidity of acts or incompetence of persons.[47]

One more office needs to be examined in regard to invalidating laws. This is the office of the Vicar described in canon 429, § 1. If a Bishop, for instance by exile, is so impeded that he cannot even by mail communicate with his subjects, the Code provides that the Vicar General or some other ecclesiastic delegated by the Bishop will rule the diocese. The Code does not say that the powers of this Vicar are those of a Vicar Capitular. It does, however, make this statement when in similar circumstances the Cathedral Chapter elects a Vicar. This can be done when no Vicar General has been appointed by the Bishop, and no other ecclesiastic has been delegated to act. It

[46] Cf. pp. 245, 246.

[47] Grandclaude (*o. c.*, p. 132) says the Chapter can legislate in urgent necessity. His opinion of the use of the power which devolves upon the Chapter during the vacancy of a See is worth quoting: "Capitulum dioecesim, juxta leges existentes, gubernare debet: sicuti per accidens et temporaliter tantum sortitur potestatem gubernativam . . . ita nihil abrogare aut innovare debet, nisi pro circumstantiis aliquod statutum evadat necessarium."

could also be done if the Vicar General or the ecclesiastic delegated by the Bishop were similarly impeded.

It would be wrong to say absolutely that the rule contemplated in canon 429, § 1 is the same exactly as that mentioned in the third paragraph of the same canon. But the whole tenor of the law expresses something that is understood to be a temporary arrangement. The need of a temporary ruler is just as well indicated in the third paragraph as in the first paragraph of canon 429. Therefore, it is reasonable to assume that the legislator intended that the Vicar General who assumes the rule of the diocese when the Bishop is impeded should govern as a Vicar Capitular. This, however, cannot be proven from the text of canon 429. It is merely the result of a comparison between the two ways of determining upon a Vicar who would act in the emergency.

From this comparison it would also be reasonable to say that the Vicar General cannot change diocesan law to enable him to annul acts or declare persons incompetent to act.

All the above Ordinaries and Vicars considered territorial rule and personal inabilities. How far these laws are of obligation outside the diocese or its equivalent will be considered in the article on the interpretation of invalidating laws.[48]

Besides local Ordinaries, it is necessary to study the powers of religious Superiors and Chapters. Some Superiors possess only dominative power over their subjects. These Superiors need not be considered in this treatise because they are unable to enact a law [49] and therefore unable to deny legal validity to acts or to declare persons legally incompetent to act. Precepts, of course, can be given by these Superiors, and punishment can be inflicted for the violation of precepts, but the punishment cannot be equivalent to an invalidating clause. Such a clause has force only in a law or in a precept imposed by one enjoying legislative power.

Besides these religious Superiors who have dominative power, there are other religious Superiors who possess jurisdic-

[48] This article will appear in the July issue of THE JURIST.

[49] Cf. Wernz-Vidal, *De Religiosis* (Romae, 1933), p. 108.

tion. It is pertinent to examine their power in regard to invalidating laws.

Canon 501, § 1 of THE CODE OF CANON LAW grants jurisdiction to Superiors and Chapters of exempt clerical religious. The Code does not specify in this canon which Superiors and Chapters are to enjoy this power. It does, however, say that this power is to be exercised according to the Constitutions of religious communities and according to the general law. The latter injunction refers principally to an enumeration of major religious Superiors.[50] The exercise of jurisdiction by religious Superiors and Chapters is an arrangement that supplies the lack of jurisdiction of the local Ordinary by reason of the privilege of exemption. This privilege is conceded in law to Regulars [51] but may also be obtained by special concession outside of the law.[52] Exempt clerical religious form a community over which Superiors and Chapters exercise a jurisdiction that is mostly personal and only incidentally territorial. With this brief introduction, the power in such a community can be examined.

The Code in canon 501, § 1 grants jurisdiction to both religious Superiors and to Chapters. This is not an entirely unrestricted grant of power. Rather it must be understood as granted according to the Constitutions of the religious. Hence, if the Constitution does not permit the full exercise of jurisdiction to a religious Superior but restricts the full use of this power to the Chapter, the religious Superior cannot claim this power as granted by THE CODE OF CANON LAW. The controlling element, then, is the pertinent provision of the Constitution.

It will be unnecessary to examine all the Constitutions of exempt clerical religious. Several will suffice. We shall take as models the Constitutions of the Order of Friars Minor, the Order of Preachers and the Rule of St. Benedict.

[50] Cf. c. 488, 8°.

[51] Cf. c. 615.

[52] Cf. c. 618, 1.

The Constitution of the Order of Friars Minor states in number 455 [53] that the General Chapter has power to make laws provided these laws are not contrary to the Constitution. There are some restrictions that are not pertinent to the matter at hand. But the Constitution makes no provision for the exercise of legislative power by the Minister General. The entire section 15 (nn. 513-520) describes the rights and duties of the Minister General, but nowhere is the clear right to legislate alone conceded. He has power to dispense from laws [54] but no power to enact them.

The Constitutions of the Order of Preachers [55] provides for laws (*ordinationes*) to be made by the General Chapter.[56] However, it is also indicated in number 33, § II that laws may be made by the Master General of the order. This power is fully described in number 470 of the Constitution. It seems likely that the word *ordinationes* of number 33, § II should be accepted in the meaning of law. The word occurs in both paragraphs of number 33 where promulgation of law is treated. The same word is used for the promulgation of the ordinances of both the General Chapter and the Master General. It is true that in number 513 the Constitution speaks specifically of the power of the General Chapter, and there it says *ad condendum leges aut ordinationes,* but this method is not used where the Constitution speaks of promulgation. Moreover, since the title of the chapter that deals with promulgation of ordinances is *De Legum nostrarum Promulgatione*, etc., the conclusion must be that law and ordinance are considered in the Constitution as signifying the same thing. This would entitle the Master General to enact laws. The Rule of St. Benedict [57] does not provide for rule of the community by Chapters. The power to rule is in the hands of the Abbot.

[53] *Regula et Constitutiones Generales Fratrum Minorum* (Quaracchi, 1922).

[54] Cf. *Regula,* etc., n. 514.

[55] *Constitutiones Fratrum S. Ordinis Praedicatorum* (Romae, 1932).

[56] Cf. *Constitutiones,* etc., n. 513.

[57] *Sancti Benedicti Regula Monasteriorum* (Friburgi Brisgoviae, 3. ed. 1935).

The monks should be occasionally called for counsel, but St. Benedict clearly indicates there is no power higher than the Abbot.[58] Whatever legislative power would exist in a abbey is exercised by the Abbot alone.

Much more, of course, could be said of the legislative power existing in a religious community, but the above outline is sufficient to indicate the controlling force of the Constitution.

Modern authors agree that some legislative power is granted to at least the Chapters of exempt clerical religious. Wernz-Vidal, for instance, say [59] the General Chapter at least can make true ecclesiastical laws. But they also say that usually the highest religious Superiors lack this power. Instead, where particular law does not forbid it, they concede a power to enact a perpetual ordinance, which, while lacking the authority of the Constitution or a law of the General Chapter, does have the force of a rule. Such rules would have all the necessary elements of an ecclesiastical law. There seems to be more of a difference of solemnity than a difference of legal force. Fanfani [60] merely says that legislative power in religious communities is reserved to Chapters and Congregations and not to Superiors. Schaefer [61] says usually only the General Chapter can make a law in the strict sense. Vermeersch-Creusen in one place [62] say in a general way that matters of great importance are left to the Chapter, and in another place they say that at least General Chapters can enact laws.[63] The highest religious Superiors, they continue,[64] frequently cannot enact laws. Cocchi [65] says briefly that Chapters can enact

[58] Cf. cap. III, *De adhibendis ad consilium Fratribus.*

[59] *De Religiosis* (Romae, 1933), p. 109.

[60] *De Jure Religiosorum* (Taurini-Romae, 2. ed., 1925), p. 67.

[61] *De Religiosis* (Münster, 2. ed., 1931), p. 183.

[62] *Epitome Juris Canonici* (Mechliniae-Romae, 5. ed., 1933), tom. I, p. 441.

[63] *O. c.*, p. 443.

[64] *O. c.*, p. 444.

[65] *Commentarium in Codicem Iuris Canonici* (Taurinorum Augustae), 1921 v. II, pp. 48-49.

laws, but he hints that Superiors can also legislate. However, in a footnote, Cocchi cites the above mentioned doctrine of Vermeersch-Creusen. Augustine [66] says the General Chapter has the right to enact and repeal laws and statutes unless these have been specifically ratified by the Pope. Writing in particular of Benedictine rule, Augustine also says [67] that Abbot-Presidents cannot make rules for the congregation or the order. The reason assigned is that a congregation of Benedictine monks (e. g., American-Cassinese Congregation) is not a juridically united body.

This doctrine of modern or post-Code authors agrees generally with the teaching of canonists in the decades before The Code of Canon Law. Grandclaude, for instance, says [68] that legislative power is sometimes exercised by the General Chapter alone, sometimes by the General Superior alone, and sometimes by this Superior and the provincial Superiors together. Hence, there was no hard and fast rule to which all the religious communities conformed. The only way to settle who possessed legislative power would be to consult the various Constitutions. Bouix [69] implied that Superiors have legislative power. This power was called quasi-episcopal. The word is taken from a decretal of Pope Alexander IV,[70] and, according to the interpretation of canonists, it included jurisdiction, but it did not extend to actions where the power of episcopal orders is necessary.

It will be readily evident, then, if we exclude the consultive Chapter of the Benedictines, that the General Chapter of an exempt clerical religious community is competent to legislate. This same statement cannot be made of even the highest Su-

[66] *A commentary on the New Code of Canon Law,* 3. ed. (St. Louis, 1920), v. III, p. 108.

[67] *O. c.,* v. III, p. 113.

[68] *O. c.,* p. 134.

[69] Bouix, D., *Tractatus de Iure Regularium* (Parisiis, 1882), pp. 408-410.

[70] C. 3, *De privilegiis,* V, 7 in VI°. Writing of the power of Abbots in their own abbeys, Pope Alexander IV says... "in quos ecclesiasticam et quasi-episcopalem jurisdictionem obtinent."

perior of these religious. His right to legislate may exist, but it must be demonstrated from the Constitution.

Given the power to legislate, can General Chapters and religious Superiors enact invalidating laws? Their power is, as Pope Alexander IV described it, quasi-episcopal. It should, then, be on the one hand as extensive as a residential Bishop's, and on the other it should be circumscribed by the same limitations. Without repeating the argument made in the discussion of the Bishop's power to enact invalidating laws, this can be set down as the actual extent of legislative power in a religious community. General Chapters and, where conceded, religious Superiors can attach invalidating clauses in matters otherwise not considered either in a general law of the Code or in the approved Constitution.

One item proper to a religious community and not pertinent to the rule of a diocese is the possible change in the law of the Constitution. If a Constitution grants certain rights can a General Chapter enact an invalidating law so that a member of the community is unable to exercise this right? The answer to this question depends on whether the Constitution has been approved by the Holy See. It is purely a theoretical point because the Constitutions of communities where legislative power exists have been approved by the Holy See. Therefore, with this approval, the law of the Constitution is supreme and cannot be changed without the consent of the Holy See. What is contemplated here is not a penalty which could, for crime, be imposed but rather a law which would declare members incompetent to act under the Constitution.[71]

[71] Vermeersch-Creusen, *o. c.*, v. I, p. 443.

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DOUBTFUL BIGAMY

CANON 1069 [1] decrees that a subsequent marriage may not be allowed until the nullity or dissolution of the prior marriage has been lawfully and certainly proven, i.e., in the manner required by law and without any doubt remaining. Canon 1014 [2] ordains that the validity of a marriage should be upheld until its nullity has been proven. Article 172 of the Instruction *Provida Mater Ecclesia,* issued in 1936,[3] further explains that only a marriage favored by well-founded doubt enjoys this presumption of validity. These three fundamental norms are the principles to be applied to the problem discussed in this paper. The problem is this: supposing that a positive, well-founded doubt about the validity of the prior marriage exists, although its nullity is not proven with certainty, may, and even must, a sentence of nullity be rendered in favor of the plaintiff who impugns the subsequent or bigamous union? The two sides of this question will be presented, though not without an expression of preference. However first, in order to clarify the issue involved, an analysis will be made of the legal presumption of validity in itself and in relation to a bigamous marriage.

[1] Canon 1069. § 1. Invalide matrimonium attentat qui vinculo tenetur prioris matrimonii, quamquam non consummati, salvo privilegio fidei.

§ 2. Quamvis prius matrimonium sit irritum aut solutum qualibet ex causa, non ideo licet aliud contrahere, antequam de prioris nullitate aut solutione legitime et certo constiterit.

[2] Canon 1014. Matrimonium gaudet favore juris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur, salvo praescripto can. 1127.

[3] "*Provida Mater Ecclesia*" (15 Aug. 1936—*AAS,* XXVIII [1936], 312-370) (art. 172). Dubium sive juris sive facti quod faveat matrimonio, debet esse prudens, seu probabili fundamento nixum, ut praesumptioni pro matrimonii valore locus sit.

Part I

A legal presumption is a conjecture made by the law as to the truth of what is uncertain and only probable. As is evident from its etymology (*prae* and *sumere*), it is a conclusion accepted as true, which has not been demonstrated to be true. Since, however, the conclusion is in accord with experience, it is upheld, and in fact imposed by the law as a practical norm of action. The immediate effect of a legal presumption is to exempt the litigant whom it favors, from the obligation of proving what it accepts as true, since the law has in effect given proof for him. For this reason, a legal presumption is equivalent to direct proof. It has the same effect both for the party whom it favors and for the party to whom it is opposed. But in itself it is a release from proof, rather than proof. It has the same relationship to proof that dispensation has to the fulfillment of law. Therefore in the case of the legal presumption of validity bestowed on every marriage contract, we may say that once the basic fact of a contract has been established, the law decrees that it is to be accepted and held to as valid until the contrary is proven, for the reason that generally marriages are valid. This application of a general principle to a concrete situation is made prior to and independent of any evidence that supports such a conclusion. The presumption itself is a legal substitute for such proof.

Being accepted as true before there is direct proof in its favor, a legal presumption has *objectively* and *of itself* only the force of verisimilitude i.e., what is likely to be true. As Bartocetti notes, a presumption is founded on the principle: "Inspicimus in obscuris quod est verisimilius vel quod plerumque fieri consuevit (*R. J.* 45 in VI°).[4] Until direct proof substantiates the presumption, as applied to a particular case, and establishes it as a certain objective fact, there will exist, at least because of the lack of evidence, a fear that objectively the contrary is true. Thus on the one hand the legal pre-

[4] Lega-Bartocetti, *Commentarius in Judicia Ecclesiastica,* p. 629 (Rome: 1938-).

sumption is accepted in practice as certainty, and on the other it does not necessarily correspond with the objective or real order. There is little need to labor an argument in support of this latter point. The very definition of a presumption as a " rei incertae probabilis conjectura " is a recognition by the law itself that there is no necessary equation between its presumption and the objective fact. It is for the same reason that a litigant, adversely affected by a legal presumption is, at least in the case of an ordinary presumption, not *de jure*, allowed to prove the presumption does not apply to the case at issue. *Praesumptio cedit veritati.* This is a further admission that a presumption of law and objective fact are not one and the same. By its presumption, the law could not and does not pretend to alter the objective order or to decide antecedently what it is in fact. Rather it seeks to conform to that order as closely as possible, though at the same time facilitating juridical action in an eminently reasonable manner. Consequently when there is definite reason to doubt the objective truth of what the legal presumption sustains as true, the presumption does not, or in fact could not, remove or annul that doubt. The presumption stands as a practical norm of action, but speculatively there also stands a doubt, at variance with the presumption, and it can be removed only by objective evidence to the contrary. In other words, theoretical objective doubt and practical presumptive certainty are not contradictory or mutually exclusive. Furthermore such a situation can exist either before or after a judicial sentence rendered in conformity with the presumption. For a decision would be merely declaratory in its effect, decreeing that the presumption did apply. It could not destroy the objective doubt.

Having considered the legal presumption of validity in a general way, the next step is to examine it in relation to a case of simultaneous bigamy. As Gasparri observes, the favor shown to a marriage by the law is the preference given to its validity rather than its invalidity.[5] The law places the *onus* of proof on the plaintiff who attacks a marriage and thereby

[5] Gasparri, *Tractatus Canonicus de Matrimonio* (ed. nova), n. 18.

favors the marriage. Now there is no reason why this initial presumption should not belong to a marriage contracted by a supposed bigamist, or in fact by any person supposedly subject to a diriment impediment. The law makes no distinction as to the contractant. It is the fact of a contract with a *species marimonii,* not the legal right of a person to make the contract, that gives rise to the presumption: "Matrimonium gaudet favore juris . . ." Even though it is not the first contract of marriage entered by the person in question, it is in itself a lawful contract and that legality entitles it to a presumption of validity. For it is possible that the prior contract, though not outwardly defective, did not create the matrimonial status between the parties to it. Therefore the law could not antecedently deny the possibility of validity to a subsequent contract. As long as that subsequent contract would enjoy at least a *species matrimonii,* the question of its validity could not be prejudged. The plaintiff attacking its validity begins his case with a legal presumption against him, and unless he can refute it he must expect an adverse decision.

Part II

Up to this point there would be no disagreement. All would admit that a legal presumption of validity has the force of full direct proof, though not necessarily identical with the objective fact, and that an initial presumption of validity belongs *per se* even to a marriage contracted by a supposed bigamist. But the real difficulty now presents itself. In a case of bigamy, will the presumption of validity in favor of the subsequent union be overthrown by the presumption of validity enjoyed by the prior marriage, even though there is positive reason to doubt the validity of that prior marriage? In other words, would the respondent and Defender of the Bond in an action against the subsequent marriage automatically lose the initial presumption of validity in their favor, by the very fact that the prior marriage is presumably valid and regardless of any positive doubt as to its validity? Smith,[6] Wanenmacher [7]

[6] "When we come to apply this principle to a *twofold or double marriage,* namely, where a person already married contracts a second marriage while his

and Manning [8] answer in the affirmative; Nau,[9] Kennedy,[10] Doheny,[11] Bayon,[12] Chelodi [13] and Gasparri [14] in the negative. The two sides will be presented in that order.

or her first spouse is still alive, *the presumption is in favor of the validity of the first,* not of the second marriage ... Hence, except in the three cases just mentioned, the *onus probandi* lies upon the plaintiff or the person asserting the invalidity of a marriage contracted." Smith, *The Marriage Process,* n. 460, 463.

[7] "For in order to prove the prejudicial question on the validity of the first marriage it is not necessary that the interested party establish the non-existence of every possible impediment, but it is sufficient to show that the first marriage was formally contracted and that the first spouse was still alive at the time of contracting the second marriage. When these two facts are established, the first marriage obtains the presumption of validity and overcomes the presumption of validity of the second marriage. He who would overcome the presumption of validity of the first marriage must prove that the marriage is invalid."—Wanenmacher, *Canonical Evidence in Marriage Cases,* p. 313-314.

[8] "The validity of the first marriage is presumed and it is the burden of anyone who claims it is not valid or that it is doubtful to show cause that the first marriage is invalid. If the Defensor Vinculi should in this fashion object or raise a doubt as to the validity of the first marriage it is his duty to PROVE his claims, i.e., he must prove that the first marriage is positively invalid. It would not suffice if he established a doubt about the validity, for this doubt does not eliminate the presumption of law in favor of the first marriage."—Manning, *Presumptions of Law in Marriage Cases,* p. 64.

[9] "Thus the presumption *juris tantum* in favor perhaps of the first marriage by no means allows the moral certainty that the former marriage was valid. Proof to this effect must be furnished. The summary trial is allowed only "*si certo constet de nullitate.*"—Nau, *Marriage Laws of the Code,* p. 225.

[10] "Such probabilities of invalidity must be resolved before the declaration of nullity may be rendered. Until there is ground for a solid probability of invalidity there should be no scruples in applying the presumption of validity sanctioned by the Church."—Kennedy, *The Special Matrimonial Process,* p. 117.

[11] "Naturally, reasonable evidence and likely indications would militate against assuming the previous marriage to be valid. The stronger the evidence and the indications, the weaker becomes the assumption."—Doheny, *Canonical Procedure in Marriage Cases,* p. 292.

[12] "Si, dubio existente de valore prioris matrimonii vel de morte conjugis, matrimonium ineunt, quaestio de valore secundi matrimonii manet suspensa in utroque foro, sed valor ipsius pendet a veritate objectiva rei."—Bayon, *Tractatus Canonico-Moralis de Sacramento Matrimonii,* I, 283d.

[13] "Dubio autem manente de *valore* prioris matrimonii vel *momento* quo illud solutum est, quaestio de valore alterius manet suspensa."—Chelodi, *Jus Matrimoniale,* n. 77 (ed. 4).

[14] "Eadem repetas [Holy Office decision, 22 March 1865—cf. footnote 17] si dubitetur num prius matrimonium validum fuerit."—Gasparri, *Tractatus Canonicus de Matrimonio,* n. 565 (ed. nova.).

AFFIRMATIVE OPINION

One argument offered in support of the affirmative opinion is that the official decisions and instructions of the Holy See regarding procedure in the case of *ligamen* have demanded only that the existence of the prior marriage be proven and have made no reference at all to the question of its validity. Canon 1990 likewise refers only to the need of proving the existence of *ligamen* by peremptory document. Therefore, since no explicit direction has been given concerning the question of the validity of the prior marriage, it is to be accepted without proof and on that basis the second marriage can be declared invalid. "Quod legislator voluit, expressit; quod noluit, tacuit."

Similar to this is the argument based on the priority of the first marriage. It has been stated in the words of two *regulae* of the *Liber Sextus:* "Qui prior est tempore, potior est iure" (n. 54); "In pari delicto vel causa, potior est conditio possidentis" (n. 65). The fact that the prior marriage came into existence first and thus acquired possession is said to entitle it to a preference over any subsequent marriage. Once therefore, the prior marriage is proven to be a fact, its possession must be recognized and its bond presumed to be valid and binding. A subsequent marriage cannot take away this legal possession and priority unless the previous bond is proven to be certainly invalid or dissolved. Therefore the subsequent marriage loses all right to the protection of the law and its presumption of validity.

The third and, seemingly, the strongest argument is stated by Wanenmacher as follows: "Thus, e. g. when there is a question of a present marriage being invalid by reason of the certain existence of a former marriage bond (*ligamen*), both marriages, on general principles, bear the presumption of validity before the court. But the presumption of validity in favor of the second marriage is at once overcome by the impediment which the first marriage establishes *prima facie* against the second." In other words, as the process begins, the marriage being attacked enjoys a presumption of validity.

But the presumption is rebuttable, capable of being overthrown by direct proof derived from documents and witnesses or indirectly by legal and human presumptions. Consequently, once the prior marriage is established as a fact, existing when the subsequent contract was made, the presumptive validity of that prior marriage is indirect proof against the validity of the later marriage. The impediment of ligamen has been proven with the aid of the legal presumption, and therefore the nullity of the subsequent marriage has been proven. "Qui habet pro se juris praesumptionem, liberatur ab onere probandi, quod recidit in partem adversam; qua non probante, sententia ferri debet in favorem, partis pro qua stat praesumptio."[15] Even a doubt about the validity of the prior marriage cannot alter this conclusion, since a mere doubt cannot upset or even weaken the presumption of validity enjoyed by the prior marriage.

NEGATIVE OPINION

It can be urged in support of the negative opinion, first of all, that the legal presumption of validity stated in canons 1014 and 1069 may be applied only in accord with its purpose. That purpose is the safeguarding of the divine law of the unity and indissolubility of marriage. The right to marry must be denied to anyone who is even only probably subject to the bond of marriage. By imposing a presumption of validity as a practical norm of action, the law follows the safer course. In commenting on canon 1014, several authors quote a statement of Innocent III against an unwarranted sentence of nullity.[16] "Tolerabilius est enim aliquos contra statuta hominum dimittere copulatos, quam conjunctos legitime contra statuta Domini separari." In other words, it is better to put aside human law than divine law. The basic and essential point to be determined in every case of bigamy is not merely the existence of a prior contract and status of marriage, but the objective fact of a prior bond; not a mere *species mat-*

[15] Canon 1827.

[16] Manning, *o. c.*, p. 59 (note 14); Gasparri, *o. c.*, n. 18; Chelodi, *o. c.*, n. 7 (note 3); Payen, *De Matrimonio*, n. 123, Wernz-Vidal, *Jus Canonicum*, V, 44.

rimonii, but a true *vinculum.* Therefore, notwithstanding the legal presumption to the contrary, a well-founded doubt as to the validity of the prior marriage, will necessarily raise a doubt about the invalidity of any subsequent marriage. If that is so, the subsequent marriage must retain its legal presumption of validity, for there is danger that divine law may be violated by a sentence of nullity. Even though no explicit decision of the Holy See has ever required that the presumption of validity stand in such a case, it is necessary by the very nature of the situation. The "statuta hominum", in the form of the presumption in favor of the prior marriage, must not prevail over the "statuta Domini" regarding the subsequent marriage. Whereas on the other hand, a judicial sentence based on the presumed validity of the subsequent marriage would duly safeguard it, without at the same time doing any injury to the prior marriage.

To this may be added the argument relied on by Gasparri. It is based on two official interpretations issued by the Holy Office regarding doubtful *ligamen.*[17] The *species facti* of both cases is the same: a wife remarries after her husband disappears (in one instance the husband was captured by rebels or

[17] "Titio capto a rebellibus, eoque frustra per duos aut tres annos desiderato, Martha ejus uxor sine assistentia proprii sacerdotis, quae ad valorem ibi necessaria non est, et contra monitum missionariorum, contraxit cum Marco. Marcus autem graviter reprehensus a missionariis vult quidem dimittere Martham, sed petit ad alias transire nuptias. Quid agendum? ... Separandos esse conjuges, et virum non posse secundas inire nuptias usque dum moraliter sit certum, quo tempore ipse matrimonium iniit cum muliere de qua agitur, primum virum ejusdem mulieris non obiisse."—Holy Office, 22 March, 1865—*Fontes,* n. 982.

"Una neofita abbondonata dal marito, son gia 14 anni, la quale non ha guari é passata in altro matrimonio con un cristiano da cui multo difficilimente potrebbe separarsi .. .Et relate ad primum casum, quum neophyta et secundus vir ejus sint ambo in mala fide, separandos esse, et monendum etiam virum non posse ad alias transire nuptias, nisi constito virum absentem adhuc vixisse quando secundum matrimonium tentatum fuit."—Holy Office, 21 November, 1866—*Fontes,* n. 997.

"Quod si novum initum sit matrimonium hujus valor pendet a facto obitus prioris conjugis, ita ut sit validum, si tempore nuptiarum novarum ille fuerit mortuus; sit nullum, si inter vivos fuerit. Cum igitur dubius sit valor alterius matrimonii, utraque pars a novo matrimonio est omnino arcenda."—S. R. Rota, 27 July, 1929—*Decisiones,* XXI, 340.

bandits; in the other he merely deserted his wife.) The same decision is given in each case: the woman must separate from her second husband, and furthermore he may not remarry until it is certain that the first husband was alive when the second marriage took place. Now it is true that these decisions concern a doubt as to the continuance of the prior marriage, rather than a doubt as to its validity. Nevertheless they offer a strong argument in favor of the negative opinion, by reason of the principle which underlies them. In every case of bigamy, the principal issue to be judged is the validity of the subsequent marriage. From that viewpoint, no distinction is to be made between a doubt about the validity of the prior marriage and a doubt about its continuance. The conclusion drawn from both suppositions must be the same: since the impediment of *ligamen* is uncertain, the nullity of a subsequent marriage is uncertain. Therefore the presumption of validity must stand for both marriages. In the instructions on procedural law issued in 1883 (one by Propaganda to the United States; the other by the Holy Office to the Bishops of the Eastern Church), the following norm is given for cases of ligamen. "Therefore in this case, before all else, the judge shall demand an authentic record of the prior marriage, and if the need arises, he shall gather other proofs which establish the existence of the aforesaid prior marriage."[18] Note a certificate of the prior marriage is not always enough. It may be necessary to have other proofs to prove that the prior marriage really exists. And certainly, validity is essential for the existence of a marriage. If therefore the validity of the prior marriage remains in doubt, its objective existence has not been proven. The presumption of validity it enjoys does not clear up the contrary doubt; it merely disregards it.

[18] "Ideo in hoc casu judex ante omnia exigere debebit, ut prioris matrimonii documentum authenticum proferatur, atque, si opus fuerit, alias probationes colliget, quae praedicti prioris matrimonii existentiam demonstrent; ... Post haec exigenda erunt a competentibus parochis authentica documenta de praetensa morte alterius conjugis, et in defectu poterunt eadem requiri ab auctoritate civili, si quos libros habuerit, in quibus adnotentur."—Holy Office and Congregation of Propaganda, 1883—*Fontes* nn. 1076; 4901.

A third argument may be drawn from the effect of a legal presumption of validity, as already explained. A plaintiff does not have to prove what the law presumes.[19] Accordingly, once the fact of a prior marriage has been established, its validity should be accepted judicially as morally certain. However, *this legal presumption of validity is not equivalent to a legal presumption of invalidity* against a bigamous union, entered subsequently by one of the parties. One legal presumption does not create another. And it has never been officially declared by law or authentic interpretation that, as a result of a prior marriage, all subsequent marriages have against them a presumption of invalidity. In the absence of a presumption of invalidity, a plaintiff in a case of *ligamen* must establish his claim of invalidity in another way. Canon 1827 is of no help to him. Any conclusion as to the invalidity of a subsequent marriage is a deduction of reason, inferred from the legal presumption as follows: "The prior marriage is presumed to be valid; therefore a subsequent marriage is invalid." The conclusion is based on a legal presumption, but it is not one itself. Therefore it is unwarranted to clothe what is only a deduction of reason in the dress of a legal presumption and to accept it as such. It is not that objection can be taken to the use of a deduction drawn from a legal presumption, in order to overthrow the presumption of validity enjoyed by the marriage being attacked. That presumption can ordinarily be rebutted by the conclusion inferred from the presumption favoring the first marriage, but not as long as the validity of the prior marriage is in doubt. Such a doubt automatically creates doubt about the second marriage. Is it really invalid as the deduction of its invalidity seems to establish? Evidently the force of that deduction is weakened by the doubt. And since the deduction is itself not a legal presumption, it cannot be upheld and applied by the judge merely because it has not been disproved with certainty. Lacking any special support of the law, it must be judged in the light of any other evidence that may exist. Until the contradictory

[19] Cf. canon 1827.

doubt is itself eliminated by suitable proof, the deduction drawn from the presumptive validity of the prior marriage is not capable of overcoming the presumption of validity enjoyed by the marriage under attack.

As a final argument, it may be pointed out that *as such* neither the priority or possession of the presumption favoring the first marriage deprives the subsequent marriage of its presumption of validity. As interpreted by Reiffenstuel, the *regulae* justifying prevalence because of priority or possession apply to a doubt of one personal right over another, a dispute arising from the conflicting actions of two individuals.[20] The *regulae* would not apply, therefore, to conflicting legal presumptions, both of which originate in the will of the legislator. That undoubtedly is the reason why authors such as Fagnanus, Reiffenstuel, Schmalzgrueber, and Wernz do not appeal to either of these axioms in determining the prevalence between contradictory presumptions.[21] Moreover, Reiffenstuel explicitly states that the norm allowing preference on the basis of possession does not apply to the case of marriage. Instead, whenever the proof on both sides is equal, the sentence must be rendered to favor the validity of the marriage instead of the possessor. This interpretation is based on a principle stated in the Decretals.[22] Therefore neither axiom is at variance with the negative opinion.

Practical Conclusion

1. Canon 1990 allows a summary process to decide the existence of *ligamen* whenever its presence can be proven by a certain authentic document " quod nulli contradictioni vel exceptioni obnoxium sit." If, on the contrary, the documentary evidence is opposed by divergent testimony or otherwise open to question, the litigation must be settled in a full formal trial.

[20] *Jus Canonicum Universum,* De Regulis Juris, reg. 54 (n. 3)—L. II, tit. XII, n. 44; reg. 65 (n. 6)—L. II, tit. XIX, n. 83.

[21] Fagnanus, *Commentaria in Quinque Libros Decretalium,* L. II, tit. XXIII, q. 744; Reiffenstuel, *Jus Canonicum Universum,* L. II, tit. XXIII, n. 90; Schmalzgrueber, *Jus Ecclesiasticum Universum,* L. II, tit. XXIII, n. 38-40; Wernz, *Jus Decretalium* V, 659.

[22] C. 3, X, *de probationibus,* II, 19.

"Quod si Ordinarius judicaverit non omnia concurrere quae requiruntur vi canonis 1990, ut de nullitate matrimonii tamquam de casu excepto ipse agere queat, causam remittat ad tribunal diocesanum, quod per viam ordinariam procedat ad normam Tituli V et seqq." [23] Consequently, whenever there is positive reason to doubt the validity of the prior marriage, the case of *ligamen* must be tried with the formalities of the ordinary procedure. If a summary process had already been started, it should be immediately discontinued and a regular trial substituted.

2. If, at the conclusion of this formal trial, a positive doubt as to the validity of the prior marriage still remains, sentence must be pronounced against the plaintiff. Canon 1869, § 1 and the *Provida Mater Ecclesia* [24] both decree: "Ad pronuntiandum cujuslibet sententiae requiritur in judicis animo moralis certitudo circa rem sententia definiendam." The judge must be certain of both the law and the facts before rendering the sentence sought by the plaintiff. Therefore, in view of the fact that there are weighty reasons against the opinion which allows a declaration of nullity when the validity of the prior marriage is doubtful, it would be wrong for a judge to act as if that view were certain. Instead he should conform to the norm stated in § 4 of art. 197 of the Instruction, which in turn is an application of § 4 of canon 1869: "Judex, qui eam certitudinem post diligens causae examen efformare sibi non potuit, pronuntiet: *non constare de matrimonii nullitate in casu.*" As a *causa favorabilis,* the marriage must be upheld instead of the claim of the plaintiff. Even canon 1127 would not seem to justify any exception to this rule, at least as far as a diocesan or metropolitan tribunal is concerned. For, according to most recent opinion, the application of this canon is reserved to the Holy Office.[25]

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[23] *Provida Mater Ecclesia,* art. 227, § 2.

[24] Art. 197, § 1.

[25] Chelodi, *o. c.,* n. 156; Aerthnys-Damen, *Theologia Moralis,* II, 922 (ed. 12); Wouters, *Theologia Moralis,* II, 722; Hurth, *Periodica,* XXVI (1937), 475; Dalpiaz, *Apollinaris X* (1937), 338.

Cases and Studies

A NEW VOCABULARY OF THE CODE

In the twenty-five years of its existence, THE CODE OF CANON LAW has several times stimulated lexicographical studies: such as the dictionary by Köstler in which the meaning, or different meanings, of the words of the Code are rendered in German, with a selection of references to the pertinent canons;[1] or Mörsdorf's monograph on the terminology of the Code[2] which makes a detailed critical examination of the consistency and precision of the juridical language of the modern ecclesiastical lawgiver.[3] Quite recently, a new publication has appeared in this field, and the jubilee of the Code is reason enough for justifying a review at some length by THE JURIST—even though the book itself will become available to Canon Law libraries in America only after the war:

> *Index verborum Codicis Iuris Canonici* digessit Arcturus Lauer Heidelbergensis. Typis Polyglottis Vaticanis. 1941. pp. xxx + 936 (in-4°).

This *Index verborum* differs from the two works just mentioned in that it has not been devised primarily as an aid for the interpretation of the Code, but as a complete statistical word list in which every recurrence of any word in the canons and rubrics of the Code[4] is carefully recorded. In Roman Law, the importance of word lists as a special branch of juridical lexicography has been widely recognized by modern scholars. The *Indices verborum* compiled by the great jurist and philologist, the late Otto Gradenwitz, for the Theodosian Code,[5] the Theodosian and Post-Theodosian

[1] Rudolf Köstler, *Wörterbuch zum Codex Iuris Canonici* (München [1927]).

[2] Klaus Mörsdorf, *Die Rechtssprache des Codex Juris Canonici* (Görres-Gesellschaft, Veröffentlichungen der Sektion für Rechts- und Staatswissenschaften, 74. Heft, Paderborn: 1937).

[3] Mörsdorf, p. 3. For previous, limited studies by other authors on inconsistencies in the Code, see *op. cit.*, p. 4.

[4] Not included are the eight *Documenta* appended to the Code. References made to them in the canons are listed by Lauer, p. 652.

[5] *Heidelberger Index zum Theodosianus*, hergestellt unter der Leitung von Otto Gradenwitz (Berlin: 1925).

Novels and other imperial rescripts,[6] or by Ernst Levy for the sources of the Western "vulgar" Roman Law,[7] have become indispensable tools of legal historical research. The word list, now presented by Arthur Lauer, a pupil of Gradenwitz, is different from these *Indices,* because it is concerned with a modern work of legislation, and adds some special features to the inventory of words: the immense linguistic material contained in The Code of Canon Law has been divided into seven series (I: verbs and nouns, pp. 1-652; II-III: conjunctions, pp. 653-688; IV: particles, pp. 689-694; V: pronouns, pp. 695-716; VI: prepositions, pp. 717-800; VII: adverbs, pp. 801-910), in the first of which the references for each verb and noun are arranged according to the various forms of conjugation and declension respectively. Moreover, each reference indicates also the grammatical and syntactical use which, in the particular canon recorded, is made of the word in question; to wit, whether it stands in a principal or in a subordinate sentence, in an interrogative or a relative clause, whether it depends upon certain prepositions, adjectives, verbs governing a determinate case or construction, and so on. All these grammatical and syntactical relations are expressed by a highly complicated system of symbols, the explanation of which fills no less than eleven pages of small print (*Conspectus operis* and *Explicatio signorum,* pp. xv-xxv).

The work thus stands between a pure *Index* and a concordance, but a concordance of a unique type. While modern concordances of the Scriptures also apply the principle of grammatical subdivision, they always combine it with quotations of the context in each reference,[8] and thereby yield information relative to the meaning, the phraseology and the linguistic properties of Scriptural words. In Lauer's *Index,* we have nothing but a record of the grammatical relations of the words.

In an appendix (pp. 911-936) Lauer draws up two tables of cross-references found in the Code. The first follows the order of canons containing references to other canons, the second is regressive, citing in order the canons referred to by other canons.

The Vatican Polyglot Press, as was to be expected, has lived up

[6] *Heidelberger Index . . . , Ergänzungsband* (Berlin: 1929).

[7] *Ergänzungsindex zu Ius und Leges* (Weimar: 1930).

[8] See, e.g., M. Bechis, *Repertorium biblicum seu totius Sacrae Scripturae Concordantiae,* 2 vols. (Taurini: 1887-1888).

to its traditions and has done a splendid piece of printing. The publication was made possible by the generosity of the late Pope Pius XI—*summa qua erat liberalitate et ad universas disciplinas, praecipue sacras et ecclesiasticas, propensione*[9]—, and was completed with the approval of the reigning Pontiff to whom it is dedicated.

Any appreciation of such a monumental work cannot fail to praise the patient and self-denying scholarship which has presented Canon lawyers with this important lexicographical instrument. And yet, reservations of principle and critical objections must be made with regard to both the general plan and many details of the volume. We may ask first whether a full *Index verborum* with complete references for even the most trivial particles of speech is of real need to the student of a modern code. The compiling of *Indices* of this kind was originally advocated and devised for fields very different from that of modern jurisprudence, that is, for fields where the historian of law or literature needs the aid of philology because it is important to him to evaluate the entire vocabulary of given literary or legislative documents (or groups of documents) which belong to an age past and cannot be safely analyzed or interpreted without full insight into their linguistic arsenal. It might be questioned whether a word list of the Code of 1917 is justified in the same degree as are word lists for Cicero, Vergil, St. Gregory the Great, or the Theodosian Code. And, as far as absolute completeness of such a work is concerned, one might recall the words written by one of the greatest scholars of our age, the late Père Hippolyte Delehaye, in a review of Gradenwitz's *Index zum Theodosianus:* " Ce que je ne parviens pas à admirer c'est qu'on a cru devoir étendre le bénéfice de cette ' acribie ' aux mots les plus usuels, jusqu'aux particules et aux temps du verbe *esse*. Fallait-il trente-quatre colonnes pour nous apprendre que le mot *et* figure dans le code quelque trois ou quatre mille fois . . . ? "[10] In Lauer's *Index*, the article *esse* fills over forty-eight, and *et*, forty-seven columns.

[9] Lauer, *Ad Lectores.*

[10] *Analecta Bollandiana*, XLIII (1925), 397. — On the other hand, absolute completeness has been defended with regard to another work, the *Vocabularium Iurisprudentiae Romanae* (see the following note), by L. Wenger in his necrology of Bernhard Kübler, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistische Abteilung, LXI (1941), p. xx, n. 13. But in this vocabulary of the *Digesta*, the reason prevailed that sometimes the use of certain particles may indicate interpolations. Besides, the *Vocabularium* abstains, e.g., from listing s.v. *sum* the instances in which *esse* is only copula.

A much more serious objection against the work regards the particular feature which Lauer gave to it by adding to each reference a symbol of the grammatical construction in which the individual word is found at the place referred to. Our criticism is certainly not directed against the author's commendable intention to go beyond a pure *Index verborum*—everybody will agree that a word list is only a necessary means of preparation by which the groundwork for the proper end of lexicography is laid—but we must deplore the fact that, in going beyond, his goal was merely a grammatico-syntactical concordance. For we are entitled to expect of a special vocabulary, if it aims at more than at pure statistics, that it convey some knowledge of words as they function in the language of the given source, i.e. that it offer materials on the possibly various meanings, constructions, combinations and phraseological use of a word, as has been admirably realized by the editors of the *Thesaurus Linguae Latinae,* or of the *Vocabularium Iurisprudentiae Romanae.*[11] Now, it is evident that no single scholar can produce all by himself a vocabulary of this highest possible type which always requires a staff of collaborators. But even for a single lexicographer, it is not impossible to strive at least in this direction, as has been shown by Robert Mayr in his *Vocabularium Codicis Iustiniani.*[12]

Mayr lists all the words with all the references, arranged according to the grammatical forms: the references for the noun *aetas,* e.g., are distributed in the sections *aetas, aetatis, aetati,* and so on. For select words of particular importance, he adds another section in which the typical combinations are recorded; in the article *actio,* e.g., we find after the list of *actio, actionis, etc.,* five more paragraphs: I. *actio attributum* (with the combinations *actionis cessio, genus, ius, . . .*), II. *actio cum attributo adiectivo vel verbali* (containing *actio aedilicia, ambulatoria, . . .*), III. *actio cum genitivo* (i.e. *actio administrativae curae, bonae fidei, commodati, . . .*), and so on.

[11] *Vocabularium Iurisprudentiae Romanae, iussu Instituti Savignani* (later: *ex auctoritate Academiae scientiarum Borussicae*) *compositum.* 5 vols. (Berolini: 1898—). Vol. I (*A–C*) was completed in 1903, vol. II (*D–G*) in 1933, vol. V (*R–Z*) in 1939; vols. III (*H–M*; 1910—) and IV (*N–Q*; 1914—) are as yet incomplete. The monumental work was begun, upon the suggestion of Theodor Mommsen, by Gradenwitz, Schulze and Kübler. Since 1900, Bernhard Kübler alone has been editor-in-chief. For further details, see the necrology by Wenger, cited in n. 10.

[12] 2 vols. (Prague: 1923-1925). The second volume (*Pars graeca*) was prepared under Mayr's editorship by Mariano San Nicolò.

In Lauer's *Index,* the need of the student to obtain such substantial and semasiological information has been completely disregarded, since the author's attention was absorbed by grammar and syntax alone. This has induced him to devise the mentioned system of symbols which records each and every grammatical nuance, and which consequently obliges the reader either to retain in memory or, each time he consults the work, to look up in the introduction a set of signs, numbers and letters in which algebraic compounds as IB_{43c} or $II(J_{16}B\zeta)$ or $p^2R^{-0}IV_{10}$ are not unfrequent. Now, what are the results of this painstaking analysis? If we take, e.g., the noun *actio,* we can reduce, after solving the symbols, the solutions found to the following summary:

I. Nominative 38 times (32 singular, 6 plural number): in principal sentences 26 times; in subordinate sentences 5 times (1 sentence depending on *licet,* 1 *quamvis,* 1 *quoties,* 1 *si,* 1 *ut*); in relative clauses 7 times (1 clause opening with *quos,* 1 *apud quae,* 1 *quo,* 3 *coram quo,* 1 *ex quo*).

II. Attributive genitive 3 times (2 sing., 1 plur.): as attribute of a noun in the accusative 2 times (1 noun governed by the preposition *ad,* 1 by *per*); of a noun in the ablative 1 time (noun governed by the preposition *de*).

III. Dative 2 times (sing.).

IV. Accusative 13 times (10 sing., 3 plur.): simple accusative 6 times; accusative with the infinitive 1 time; accusative governed by the preposition *ad* 6 times.

V. Ablative 20 times (12 sing., 8 plur.): simple ablative 7 times; absolute ablative 1 time; ablative governed by the preposition *cum* 1 time, *de* 11 times.

Nobody except the grammarian will be interested in these details. There is no need of our being informed that the subordinate sentences in which *actio* occurs begins with *licet, quamvis, quoties, si, ut, quos, apud quae, quo, coram quo, ex quo;* or that the genitive *actionis* sometimes depends on a noun which itself is given in the accusative or the ablative case. All these relations are absolutely irrelevant because they may equally apply to any other word whatsoever, whereas the only relations which deserve to be lexicographically recorded are not found in the *Index:* namely the typical usages and combinations of *actio* in The Code of Canon Law. With his list of references for the word *actio* once prepared, it would have been none too difficult, and much more valuable, if Lauer had given us the following information: [13]

[13] In composing the following specimen, I have relied upon the completeness of Lauer's references. Cf. also Köstler, *Wörterbuch,* s.v. *actio;* Mörsdorf,

A. *Enumeratio locorum, secundum ordinem casuum:* ...[14]

B. actio (= *ius vel modus persequendi iudicium*[15]). **I.** actio *cum verbis:* actio competit 1434, 1. 1855, 2. deficit 1687, 2. est directa 1564. est sublata 1704. 1704, n. 1. habet forum 1560, n. 1. habet locum 1691 (*cf.* actioni locum dare). oritur 2210, 1, 1. 2210, 1, 2 (*cf. sub II:* ex delicto orta). perdurat 1703, n. 3. actioni locum dare 104. renuntiare 1662. actionem admittere *passive* 1695, 2. 1698, 2. cumulare 1670, 1. dare *passive* 1017, 3. 1536, 3. 1679. definire 2210, 2. dicere *passive cum praedicato* 1668, 1. 1690, 1. dirigere (*cf.* actio est directa). explicare *passive* 2210, 2. exstinguere *passive* 1701. 1701 (*cf. sub V:* exstinctio actionis). habere 1678. 1695, 1. 1698, 1. instituere 536, 4. 1685. 1690, 1. 1725, n. 2. 1855, 3. 1938, 1. 1938, 2. 1946, 2, 2. 1997. perimere *passive* 1702. 1703, n. 1. 1703, n. 2. praescribere *passive* 1511, 1. 2222, 2 (*cf. sub V:* actionis praescriptio; sublata per praescriptionem actione 1704). praestare 1694. promovere *passive* 1612, 2. proponere *passive* 1630, 1. 1702. 1703. 1705, 1 (*cf.* per modum actionis proponi potest 1893). revocare ad examen 2210, 2. reservare *passive* 1934. tollere (*cf.* actio est sublata). vocare *passive cum praedicato* 1668, 2. 1684, 1. ad actionem attinere 1922, 1. 1922, 2. actione convenire 1669, 1. dimicare 1668, 1. munire 1667. obtinere 1684, 1. uti 1684, 2. 1696, 1. de actione agere *passive* 1703, n. 1. 1703, n. 2. 1703, n. 3. **II.** actio *cum attributo praepositionali:* actio ad damna sarcienda 1704, n. 1 (*cf.* ad reparanda damna, ad reparationem damnorum, de, ex damno infecto, ob damna). ad exhibendum *r*1819. ad obtinendam declarationem nullitatis 1679. 1855, 2 (*cf.* ob nullitatem actorum, super s. ordinationis nullitate). ad obtinendam periculi remotionem 1678. ad petendam matrimonii celebrationem 1017, 3. ad poenam declarandam vel infligendam 2210, 1, 1. ad reparanda damna 2210, 1, 2. ad reparationem damnorum 1017, 3. ad satisfactionem petendam 2210, 1, 1. de damno infecto 1678 (*cf.* ex damno infecto). de eadem re sive de diversis 1669, 1. de spolio 1560, n. 1. 1698, 1. de statu personarum 1701. ex damno infecto *r*1676. ex delicto orta 1704, n. 1 (*cf.* ob delicta qualificata). ex novi operis nuntiatione *r*1676. in rem directa 1564. ob damna 1536, 3. ob delicta qualificata 1703, n. 2. ob homicidium (*cf.* ob simoniam vel homicidium). ob nullitatem actorum *r*1679 (*cf.* ad obtinendam declarationem nullitatis). ob simoniam vel homicidium 1703, n. 3. super obligationibus 1997. super sacrae ordinationis nullitate 1997. **III.** actio *cum attributo adiectivo:* actio accusatoria *r*1934. 1946, 2, 2 (*cf.* actio seu accusatio criminalis 1934). civilis 2210, 1, 1. 2210, 2. contentiosa 1704, n. 1. conventionalis 1630, 2. criminalis 1702. 1702. 1703. 1703, n. 3. 1704. 1934. 1938, 1.

Rechtssprache, pp. 319 ff.—For the sake of brevity, I cite, e.g., 1534, 1 (= can. 1534, § 1); 2210, 1, 1 (= can. 2210, § 1, n. 1); 1704, n. 1 (= can. 1704, n. 1); *r*1819 (= rubric before can. 1819). The remark, *passive*, is added where a verb is used in the passive voice only.

[14] *Quaeras apud Lauer, p. 6 sq., mutatis mutandis.*

[15] *Sic definit Vocab. Iurispr. Rom., I, 103.*

1938, 2. eadem 1684, 2. omnis 1702. personalis 1511, 1. 1534, 1. 1701. 1922, 2. petitoria 1670, 1. 1668, 1. plures 1669, 1. poenalis 2210, 1, 1. 2222, 2. possessoria 1668, 2. 1670, 1. *r*1693. 1694 (*cf. sub IV:* recuperandae, retinendae possessionis). principalis 1692. realis 1511, 1. 1701. 1922, 1. reconventionalis 1630, 1. *r*1690. 1691 (*cf.* actio . . . dicitur reconventio 1690, 1). rescissoria 104. *r*1684. 1684, 1. 1687, 2. **IV.** actio *cum genitivo attributivo:* actio indemnitatis 1536, 3. iniuriarum 1703, n. 1. recuperandae possessionis 1698, 1. restitutionis in integrum 1536, 3. retinendae possessionis 1695, 1. 1696, 1. **V.** actio *attributum:* extinctio actionis *r*1701. per modum actionis 1893. praescriptio actionis 2240 (*cf.* sublata per praescriptionem actione 1704). **VI.** actio *aequiparatur vel opponitur:* de actionibus et exceptionibus *r*1667. de mutuis petitionibus seu de actionibus reconventionalibus *r*1690. actio quam reus . . . instituit . . . dicitur reconventio 1690, 1. de actionibus seu remediis possessoriis *r*1693. actio seu accusatio criminalis 1934.

C. actio (= *actus, activitas*): sacramentalia sunt res aut actiones quibus Ecclesia uti solet 1144. (votum) quo actio voventis promittitur 1308, 4. conatui delicti accedit actio 2212, 3. si actio sit adhuc graviter culpabilis 2229, 3, 2. si delicta eadem vel distincta actione committantur 2244, 2, 1. ad actionem vel omissionem inducere 2407.

The absence of any such semasiological principle of arrangement from Lauer's work is particularly regrettable where words have different technical meanings. If we study, e.g., the article *mandare*, again all the possible grammatical constructions [16] are recorded, but no attempt is made to indicate such different usages of *mandare* as *exsecutioni mandare* (= *exsecutionem curare*, almost *exsequi:* 58. 59, 1. 447, 1, 2. 666. 1591, 1. 1899, 3. 1917, 1. 1918. 1919. 1920, 1. 1921, 1); *mandare* (= *iubere:* 1717, 2. 1863, 3. 1957. 2115, 1. 2243, 2); *corpus sepeliendum mandare* (= *tradere:* 1203, 2. 1240, 1, 5. 2339); *mandare* (= *inducere ad delictum:* 2209, 3); *mandare* (= *procuratorem instituere:* 1089, 1. 1089, 2. 1089, 3. 1226, 2. 1659, 1. 1659, 2. 1659, 2. 1664, 2); *scriptis mandare* (= *scribere:* 2103, 3).

Under these circumstances, the impression is inevitable that all the complicated and refined work of grammatical analysis performed by Lauer gives too much, and does not give enough. Except for its nucleus, the pure word list with its references, the volume will be of little use to the student of Canon Law. If the author recommends his method for the purpose, *ut . . . laborque investigationum*

[16] *Mandare* and its forms in principal sentences, in secondary sentences governed by *si*, in relative sentences (*qui, quod*), in interrogative sentences (*num*); in the accusative with the infinitive; as attributive genitive (*mandantis*) of a noun in the accusative case governed by *post;* in the ablative case.

[*sit*] *allevatus, quippe quam, signis semel intellectis, ceteros locos, qui iuxta eadem signa ad rem non faciant, inspici non oporteat,*[17] he evidently has in mind that syntax and grammar of the Code are the *res* which the reader wants to know. We do not believe that many Canon lawyers will study the Code from this angle.

But even if we would admit—*dato, non concesso*—that a grammatical concordance was worth the immense toil, there remain several points which are open to internal criticism. For one, the references to the syntactical classification are incomplete. As a rule, the symbols for principal sentences, relative, interrogative, and other secondary clauses are added in the list of nouns, adjectives, and participles only to the references regarding the nominative case. Yet we can see no reason for the omission in the other cases. If we are informed that the nominative, *actio* or *actiones,* is twenty-six times found in principal sentences, seven times in relative and five times in other secondary clauses, why, then, is the grammatical information concerning the genitive, dative, accusative and ablative restricted to the indication of the nouns or prepositions from which they depend, or to recording the use of the accusative with infinitive and the ablative absolute? [18]

More serious are some intrinsic deficiencies of the division of the entire *Index* into seven series. We shall not dwell upon the question of principle whether it is advisable or not to abandon the common method of alphabetically listing all the words in favor of an arrangement in several classes according to the parts of speech. But if such a division is made, it should be as logical and consistent as possible, and leave no doubt as to where the reader is supposed to seek for a word. In Lauer's system there are several basic defects and arbitrary classifications which we fail to understand. The series *Coniunctiones,* e.g. (II-III), contains only subordinate conjunctions (*alius ac, antequam, antequam tamen, cuiusmodi, cum,*

[17] This passage is taken from the announcement which appeared on the back-covers of several numbers of the *Acta Apostolicae Sedis* in 1940 and 1941. The preface, *Ad Lectores,* of the book itself does not explain the purpose of the work.

[18] Another example: the infinitive in the passive voice, *mandari,* is three times recorded as occurring in principal sentences; the fourth reference, to can. 1918 (. . . *decretum . . . quo scil. edicatur sententiam ipsam exsecutioni mandari debere . . .*), is given as E_1d 1918 (IV B), i.e. accusative with the infinitive governed by *edocere,* infinitive governed by *debere.* Of the relative clause (in Lauer's system it would be: V R^{-o}) no mention is made.

... si, ... ubi, ... ut, ...), while all the co-ordinate conjunctions (*ac, attamen, aut, autem, et, sed, vel ...*) are relegated into the series of adverbs (VII). And the subordinate conjunctions themselves are, with a hair-splitting distinction, distributed in two series, according to whether they occur in secondary (II) or in elliptic (III) sentences, whence the reader is obliged to look up some of the most common conjunctions (*dummodo, licet, nisi, quam, quamvis, quamquam, ut*) in two different places.

Under the rubric *Particulae* (series IV) there appear all and none but the interrogative words, whether they be interrogative conjunctions (*an, cur, num*), or pronouns (*quis, quid, qui, quae*); and this without observing any alphabetical order.—The treatment of pronouns in general is very unsatisfactory: the series *Pronomina* (V) contains nothing but relative pronouns, while all the demonstrative, possessive and indefinite pronouns are listed among *Nomina et verba* (series I), and the interrogative ones under *Particulae* (IV). Why, then, a series of *pronomina* at all?

Finally, after the prepositions (VI), the last series, *Adverbia* (VII), contains a strange mixture of pure adverbs (*adamussim, adeo, adhuc, alibi, aliquandiu, ...*), of adverbial forms of adjectives and substantives (*absolute, acatholice, accessorie, actu, ...*)—which are listed in their other forms, of course, as *nomina* (series I)—and of all the co-ordinate conjunctions. The lack of any distinction in this series seems hardly justified, all the more when the author has previously deemed it necessary to single out some very specialized sub-categories of parts of speech, as in series II, III, IV, V. In series VII, we thus find for instance the word *alias* with a motley list of references regardless of its different grammatical use, e.g., in can. 84, § 1 (*alias dispensatio ... invalida est:* conjunction) and in can. 476, § 1 (*quae ... confectae vel alias neglectae fuerunt:* adverb).

We may bring here our reflections to an end. No sensible critic will expect flawless perfection of human learning, and of lexicographical work in particular, which requires such immense toil, accuracy and self-denial. We also shall not hold some occasional mistakes [19] against the reliability and the undeniable accomplishments

[19] I ran into the following three by chance. In the preface, the name of Professor Hilling is misspelt *Hillig*. A grammatical slip occurs in the article *Ordinarius* (pp. 409 ff.) where the last reference, to can. 2188, n. 1 (... *ex causis ipsi Ordinario notis:* dative) is classified as V C_5, i.e., as ablative

of this monumental *Index verborum*. What we had to criticize, however, was Lauer's general plan of burdening the *Index* with a rather useless syntactical concordance, and the inconsistency of his classification of the parts of speech—if that classification was necessary at all. What remains is, above all, the word list itself. We gladly concede that, with it, Lauer has laid solid foundations for the work which is left to future lexicographers: the complete and final *Vocabularium Codicis Iuris Canonici*.

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BLESSINGS AND CONSECRATIONS BY SCHISMATICS

Through my personal contacts with the members of this parish while it was schismatic I have succeeded in bringing these members back to union with the Holy See and their rightful ordinary. I have complied with all the regulations for effecting their reconciliation with the Church. But there remains the problem which is concerned with the reconciliation of places and things. For the church was built by the parish, as was also the school, while the parish was in schism. Both the church and the school were blessed by the schismatic bishop. The cemetery which was bought by the congregation was likewise blessed by him. Furthermore, several chalices here were consecrated by him. The ciborium and the vestments were blessed in virtue of faculties issued by him, and the Way of the Cross was erected under his commission.

I. Will the church, school and cemetery have to be blessed anew?

II. Will the chalices have to be reconsecrated?

III. Should I bless the vestments and the ciborium in virtue of the faculties which are delegated to the priests of this diocese?

IV. What should I do about the Way of the Cross?

MISSIONARIUS

For the sake of properly exploring the divers possibilities which could attend the submitted case one may assume: 1) that the schismatic bishop lacked the possession of valid sacred orders, and hence also the possession of valid episcopal consecration, or 2) that he possessed valid sacred orders, but lacked valid episcopal consecration,

governed by the preposition *ex*.—The abbreviation, *cit.*, appears correctly in series I, s.v. *citare*, under the participle *cit(atus)* where the list of references includes the instances of *citatus* (= *in iudicium vocatus*) as well as seven instances of *cit(ati, -atum, -ato) can(onis, -onem, -one)*. But an eighth instance (2272, 3, 2: . . . *servetur praescriptum cit. can. 2271, n. 2*) is recorded among the adverbs (!) in series VII, s.v. *cit.* (p. 817).

or 3) that he possessed valid sacred orders, and valid episcopal consecration.

Under the first supposition all his personal acts of blessing and consecration, as also the supposed faculties issued by him, must of necessity be held as null and void, for the power to attach a sacramental blessing or consecration to any place or object can essentially derive only from a pre-existing power which is exclusively connected with the possession of sacred orders.

In the second assumption a distinction must be made relative to consecrations and blessings. No one who in sacred orders lacks the episcopal character can validly perform or execute a consecration, except inasfar as the law itself or an apostolic indult has made it permissible for him to do so.[1] On the other hand, while any priest is capable of imparting blessings which are not reserved to the Roman Pontiff, or to bishops, yet, even the reserved blessings are validly, though not licitly, imparted by him as long as the Holy See has not ruled to the contrary in connection with the reservation of which there is question.[2] The validity of any consecration or blessing, be it constitutive or only invocative, depends furthermore, of course, on the use of the liturgical formula as prescribed by the Church.[3]

In the light of the third contemplated set of circumstances—wherein it is supposed that the schismatic bishop was a validly consecrated prelate—one needs only to certify whether his excommunication, which was consequent upon his schismatic status, carries with it also the forfeiture of his power to confer a valid blessing or consecration. In making schismatics automatically subject to excommunication canon 2314 states in addition that, unless upon a warning they have repented, such schismatics are not only to be deprived of whatever benefice, dignity, pension, office or other assignment of duty or responsibility they may have in the Church, but are also to be declared infamous, and, if they be clerics, are to be deposed when another admonition has proved fruitless. Since all the last mentioned penalties ensue only upon a condemnatory sentence, it remains to see what the law states with reference to excommunicates.

[1] Canon 1147, § 1.

[2] Canon 1147, §§ 2-3.

[3] Canon 1148, § 2.

Canon 2261, § 1, bars an excommunicated person from licitly dispensing the sacraments or the sacramentals, but does not set up any prohibition which makes the administration of the sacraments or sacramentals eventuate in invalidity. Quite in agreement with this ruling canon 1146 states that the *legitimate* minister of the sacramentals is he who is invested with the requisite power and who is not barred by the competent ecclesiastical authority from exercising it. Inasmuch as a legitimately exercised act presupposes validity in the power which is exercised, and then, in order to be legitimate, demands in addition that that power be not exercised in contravention of any prohibition contained in the law, it follows that the valid minister of the sacramentals must be he who is invested with the requisite power, even though by law he be simultaneously prohibited from exercising it. For the capacity of imparting a sacramental blessing to any place or object is exclusively inherent in the status created by sacred orders, and the capacity of imparting a sacramental consecration is in so far exclusively connected with the consecrated status of a prelate as the Holy See, by law or special indult, has not provided otherwise.[4]

From the considerations as here outlined it is evident under what circumstances the blessing of the church, school and cemetery, and the consecration of the chalices, are to be regarded as valid or invalid. But a few additional principles must be weighed with relation to the ciborium and the vestments which were blessed in virtue of faculties issued by the schismatic bishop, and with reference to the Way of the Cross which was erected under his commission.

According to canon 210 it stands as a general rule that even a legitimate ecclesiastical superior can not share with others the power of orders which is connected with his office or committed to his person. The law or an indult must expressly make the concession if such a power is to become transferrable. Now, canon 1304 enumerates the various classes of ecclesiastical persons who have the power to bless such utensils and appurtenances which according to liturgical law require a blessing before they are employed for the use that is proper to them.

All bishops are mentioned as having this power, and also all local ordinaries who are not bishops are stated to have this power, but the latter only for the churches and oratories of their proper terri-

[4] Canon 1147, § 1.

tory. Priests, too, can be given this power by their local ordinaries, regardless of whether or not the latter have episcopal consecration, but then the power of the priests is conditioned upon the extent of their delegation and *upon the jurisdictional limits of the delegating ordinary*. The latter clause makes it very evident that the faculties which the schismatical bishop imparted were without validity, since it was not possible for him to impart them in the capacity of a local ordinary. On the other hand, if he had personally blessed the ciborium and the vestments in the prescribed liturgical form, then the blessing would have been imparted validly, and hence nothing would stand in the way of the continued use of the ciborium or of the vestments, for while the law did indeed forbid the bishop in question to bless them, yet there is no law against the use of validly blessed ciboriums or vestments, even though they were blessed unlawfully. The allowable use of ciboriums or of vestments for the purpose which they serve is conditioned not on their lawful but on their valid blessing.

Canon 349, § 1, 1 °, grants the personal privilege to a bishop, *ab accepta authentica notitia peractae canonicae provisionis*, to erect the Way of the Cross, *ritibus tamen ab Ecclesia praescriptis*. If the schismatic bishop received his valid episcopal consecration without being preconized a bishop by the Holy See, or at least with its approval, then the privilege accorded in canon 349, § 1, 1 °, relative to the erection of the Way of the Cross is not enjoyed by him. If, however, he lapsed into schism after his lawful consecration to the episcopate, then it may be asked whether he lost this privilege in view of his present schismatic status.

It is true, of course, that when favors or dispensations are granted by the Holy See to persons who are under ecclesiastical censure, then these grants are valid as long as the censure does not stand certified as the result of a declaratory or condemnatory sentence.[5] Analogously, one may conclude that the Holy See does not recall favors or dispensations already granted, as long as the recipient is not under a censure which is consequent upon a declaratory or condemnatory sentence.

But the faculty of erecting the Way of the Cross involves the use of a privilege even by a bishop.[6] And a privilege ceases if in the

[5] Cf. canons 36, § 2; 2265, § 2; 2275, 3°; 2283.

[6] Canon 349, § 1, 1°, precisely states: "Episcopi . . . fruuntur *privilegiis* de quibus in can. 239, § 1, . . . nn. 5, 6, ritibus tamen ab Ecclesia praescriptis." [Italics inserted]

course of time circumstances have altered in such a manner that in the judgment of a superior it becomes something obnoxious, or its continued use becomes unlawful.[7] The statement that a schismatic bishop's use of this privilege connotes something that is not lawful needs no further elaboration. Hence it appears plain that he no longer enjoyed the privilege once he had lapsed into schism. It follows that he could not even in his own person validly erect the Way of the Cross, much less have someone else do so under his commission. The privilege granted to bishops in canon 349, § 1, 1°, can not be communicated by them to others, for these privileges are of a personal nature in which even a vicar general has no share.[8] Hence any attempt on the part of the schismatic bishop to delegate the faculty of erecting the Way of the Cross to someone else was bound to eventuate in futility, not solely inasmuch as he himself did not enjoy the faculty, but also inasmuch as he could not have communicated the faculty even if he possessed it personally.

The answers to the various questions raised thus become readily apparent.

I. The church, school and cemetery will not have to be blessed anew if the schismatic bishop enjoyed valid episcopal consecration, or even valid sacred orders, provided that the dedicatory or consecratory liturgical formula as prescribed by the Church was employed.

II. Under the supposition that the bishop was a validly consecrated prelate and used the formula as prescribed for the consecration of a chalice, it is not necessary to reconsecrate the chalices. If he enjoyed valid sacred orders, but not valid episcopal consecration, then the chalices will have to be reconsecrated, for neither by law nor by indult was he permitted to undertake their consecration, and this circumstance makes the attempted act of the consecration of the chalices to be null and void.

[7] Canon 77.

[8] The truth of this statement is exemplified by the response of the Sacred Penitentiary on July 18, 1919, regarding the privilege of blessing rosaries, chaplets, crosses, medals and scapulars (*AAS*, XI [1919], 332), and borne out in full by a response of the Sacred Penitentiary under date of November 10, 1926 (*AAS*, XVIII [1926], 500). The latter document contains the following two queries: 1) May bishops, at least by way of an act of individual provision (*per modum actus*), communicate to the priests of their jurisdiction the faculties mentioned in can. 349, § 1, 1°? and 2). Do these same faculties belong also to the vicar general? To both queries the answer was in the negative.

III. The present pastor of the erstwhile schismatical parish should bless the vestments and the ciborium, for the schismatical bishop could not authorize their blessing by another for the reason that he was not a local ordinary.

IV. The Way of the Cross should be erected anew, for whoever erected them under the bishop's commission proceeded without the authorization so essentially necessary according to the decree *Iamdiu ac saepe,* issued by the Sacred Penitentiary under date of March 12, 1938.[9]

CLEMENT BASTNAGEL

THE CATHOLIC UNIVERSITY OF AMERICA

A GENTLEMAN'S AGREEMENT

ACCORDING TO CANON 463, § 3

The purpose of this literary elaboration is to present to the readers a practical application of Canon 463, § 3, not only according to the full rigor of the principles of canon law, but as mitigated by what is commonly known as a " gentleman's agreement ", referred to in THE CODE OF CANON LAW as natural equity [1] or as canonical equity [2] or under the juridical phrase " *ex aequo et bono* ".[3]

THE CODE OF CANON LAW is a masterpiece containing " *nova et vetera* ", admired not only in Catholic circles, but by eminent Protestant jurists as well.[4] The Canons in THE CODE OF CANON LAW [5]

[9] *AAS*, XXX (1938), 111-112. In this connection the reader may with profit consult also an article on the *Erection of the Way of the Cross* in THE JURIST, II (1942), 162-165.

[1] Natural equity is mentioned v.g. in Canon 643, § 2: " . . . naturali aequitate servata, per aliquod tempus, mutuo consensu . . . ".

[2] Forcellini, *Totius latinitatis lexicon*, s.v. " aequitas ", n. 5: " Saepius sumitur pro aequalitate inter homines, quae ad iustitiam pertinet. Differt tamen a iustitia proprie dicta, quod haec secundum iura et leges semper iudicat, nec unquam ab iis discedit; *aequitas* autem remittit interdum aliquid, legesque, ubi opus est, benigne interpretatur, estque media inter ius summum et indulgentiam ".

[3] Cf. can. 1500: " . . . cum debita proportione ex bono et aequo . . ."

[4] Stutz, Ulrich, *Der Geist des Codex iuris canonici*, Stuttgart, 1918), p. 51: " Im Vatikan und in weitesten Kreisen der katholischen Kirche empfindet man über den Abschluss des Gesetzeswerkes keine geringe Genugtuung. Und das mit Recht. Gewiss handelt es sich dabei nicht um eine schöpferische Tat, die von Grund aus Neues ins Leben rief. Das Alte, im Dienste der Kirche Be-

announce in precise, well-chosen, technical and juridical terms firm and established general principles and canonical norms to be observed by those whom it binds, leaving, however, in many instances to the parties therein concerned a broader interpretation in daily life in the form of a mutual agreement "*ex aequo et bono*". This applies to the above quoted Canon 463, § 3.

Canon 463 rules: § 1. The pastor has the right to the revenue to which legitimate custom or legal taxation entitles him according to the norm of Canon 1507, § 1.

§ 2. If he exacts more than he is entitled to, he is bound to restitution.

§ 3. If any parochial affairs are discharged by another priest, the fees or offerings belong to the pastor, unless it is certain that those making the offering wished otherwise concerning the sum that is over and above the ordinary tax.

§ 4. The pastor must not refuse to serve gratuitously those who are not able to pay for the services.

This is the law in its full rigor; we must adhere to it according to the well known adage: "*Quidquid legislator voluit, expressit; quod noluit, tacuit*". Looking more attentively, however, at the text and context of this canon, and comparing it with the various canonical parallels in this matter, there is ample room for a reimbursement based on equity, or what is commonly called a "gentleman's agreement" in Canon 463, § 3: "If any of the parochial affairs are discharged by another priest...".

Looking at the wording of the last phrase of paragraph 3, two things are stressed and must be taken into consideration:

I. A parochial affair (*paroeciale aliquod officium*).
II. Another priest's discharging it.

währte, steht durchaus im Vorgrund. Das katholische Kirchentum ist ja überhaupt seinem ganzen Wesen nach traditionalistisch, konservativ. Auch sahen wir, dass der Gesetzgeber von vornherein die Neuerungen auf das Notwendigste beschränken wollte. Was wir vor uns haben, ist also mehr nur ein Um- und Neuguss des überlieferten Stoffes. Aber auch schon das nötigt uns Achtung ab und schliesst ein erhebliches Verdienst in sich..."

[5] Some authors, like Vermeersch-Creusen, call it the "*New Code of Canon Law*", a name which is not entirely correct. Its official name is: "*Codex iuris canonici*" as indicated in: Benedictus XV, const. "*Providentissima Mater Ecclesia*", die festo Pentecostes (27 maii), 1917, attached to Cardinal Gasparri's Preface to the Code.—The reason is, that not all the particular Canons in the Code are entirely new; much material is taken from the former *Corpus Juris Canonici* and somewhat modified to suit our times.

I. Parochial Affairs

By parochial affair is meant:

1) any act of the sacred ministry connected with the administration of the Sacraments and the Sacramentals v.g. a Mass celebrated in connection with a solemn baptism of one or several converts who, after the services are performed, make a single offering for both; a wedding or funeral Mass, etc.

2) any act of voluntary jurisdiction such as: writing out certificates of baptism, marriage, burial, and testimonials of all kinds, all of which come under the jurisdiction of the pastor, are to be issued in the parish office by the pastor or at his request, require the pastor's signature or his substitute's and the parochial seal, and involve offerings and fees according to Diocesan Statutes or legitimate local custom to which the pastor is entitled.

Ad 1). *Sacraments and Sacramentals.* Offerings on the occasion of baptism whether of infants or adults, whether private or solemn, whether in church or, in case of necessity, in a hospital or private home; on the occasion of the churching of women after childbirth,[6] of confirmation (where such a custom exists), of the First Communion of children, of weddings, of burials, of the blessing of homes connected with a parish visitation for the feast of Epiphany,[7] on Holy Saturday,[8] or on other customary days [9] according to the liturgical books; [10] as well as fees for the proclaiming of the marriage banns, Christmas and Easter collections for the benefit of the pastor where Diocesan Statutes permit them,[11] and the All Souls'

[6] Vermeersch-Creusen, *Epitome*, n. 503: "Benedictio puerpurarum iure communi non reservatur parocho; iure tamen particulari ipsi reservari potest, quod obtinet e.g. in dioecesi Brugensi". — Good order, however, demands that no other priest should interfere with the pastor's regulations in his own church.

[7] In some Polish and Slavish parishes there is a custom from immemorial times in their native lands, that priests make a house-to-house visitation around the feast of the Epiphany, bless the homes and receive a free-will offering.

[8] In Rome, there is an immemorial custom of blessing the homes throughout the city on Holy Saturday within the jurisdiction of each pastor. The pastors of Rome invite other priests (students at the various universities or religious from nearly monasteries) and the people give their annual offerings for the benefit of the pastor.

[9] Cf. can. 462, 6°: "Domibus ad normam librorum liturgicorum benedicere Sabbato Sancto vel alia die pro locorum consuetudine".

[10] Cf. *Rituale Romanum*, tit. VIII, c. IV: "Benedictio domorum in Sabbato Sancto et reliquo tempore paschali."—Cf. Appendix ad *Rituale Romanum:*

Day collection,[12] are considered pastor's revenues, although some other priest has performed the act of sacred ministry or of jurisdiction or even of mere transcription. There are, however, two exceptions to be made in this matter. *First,* the celebrant of the Mass connected with these parochial affairs (*paroeciale officium*) is always entitled to a Mass stipend according to the Diocesan Statutes, for instance: if the schedule of Mass stipends, approved by the Bishop, allows the celebrant five dollars for the celebration of a Mass at nine o'clock, and the fee for a funeral with Mass, according to the Diocesan Statutes, is listed as ten dollars, the celebrant has a right to a five dollar Mass stipend, and the remainder is considered the funeral fee and as such belongs to the pastor according to Canon 463, § 3. *Secondly,* the actual minister is partial beneficiary when a donor of an offering, Mass stipend, or fee stipulates expressly that the excess offering above the usual diocesan schedule is given as a personal gift as a special consideration to the celebrant, officiating priest or clerk.[13] Canon 463, § 3 rules: "... the fees or offerings belong to the pastor, *unless it is certain that those making the offering wished otherwise concerning the sum that is over and above the ordinary tax.*"

It is evident, that in certain cases the donor intends to give to the "other priest" not only the usual Mass stipend, but also an extra offering as a token of appreciation of his services in this connection v.g. for an extra conference or sermon preached after Mass by a missionary and requested by a society or sodality through the pastor, for which an extra five or ten dollar bill is given the pastor for the extra service of the missionary; or for an early Mass with

"Benedictio domorum in Festo Epiphaniae".—*Rituale Romanum,* (Benziger edition, New York, 1925).

[11] The Diocesan Statutes have to be consulted on this point. In some dioceses only the Christmas collection is permitted for the pastor; in other dioceses both the Christmas and Easter collection are for the pastor; in some dioceses neither is permitted, but the pastor gets an allowance from the church treasury to pay for Mass wine, dues to the Infirm Priest fund, the salary of the household, etc.

[12] In some American parishes there is a custom now prevailing that people deposit their free-will offerings a few days prior to, or on All Souls' day, as a bulk-stipend for a solemn Mass on that day. An announcement, however, has to be made or a notice posted "per tabellam appositam" to this effect that this is not for individual Masses.

[13] V. g. for writing to several pastors for information, etc.

distribution of Holy Communion on a first Friday of the month celebrated at an early hour for the convenience of the working class after a previous Sunday announcement that the collection taken up during that Mass will serve as Mass stipend for the celebrant who will apply this Mass according to the intentions of those contributing. Such and similar offerings are given *intuitu personae*,[14] and the pastor has no right to claim it, unless he would intend to mislead the people.[15]

This principle also applies to extra offerings in behalf of the "other priest" in connection with the administration of other Sacraments, v.g. an extra offering given to the officiating priest at baptism; to a bulk offering of ten dollars given to an assistant by a convert after the completion of the course of instructions with the not unusual remark: "Well, Father, this is my donation to you for all your trouble in my behalf"; for special services rendered in attending a sick call or in visiting the sick in a remote hospital, although performed in the name and at the request of the pastor. The reason is, that all such extra services are considered special favors, and the people always may give an extra offering to the "other priest" *intuitu personae*.

The pastor has no right whatsoever to share in the Mass stipends for Masses celebrated during his absence by his assistants or by a substitute, v.g. during his vacation trip to Europe for two months. Many anniversary high Masses, funeral and wedding Masses may have been chanted in his absence, which he would have reserved to himself had he been at home, distributing to the assistants the stipends for low Masses. Upon his arrival at home, he might desire an account of all the moneys received, or at least some portion of it. He is, however, not entitled to any share, according to the rule of Canon 827: "All negotiation or trading of any kind in connection with Mass stipends must be absolutely avoided".[16] This is, of

[14] The canonical phrase "*intuitu personae*" as interpreted here does not, of course, agree with the fixed ideas of some pastors.

[15] The celebrant of this Mass, of course, could in advance say: "Well, I shall be satisfied with a stipend of three dollars for this Mass and all the accessory inconvenience connected with it; you may take the balance from this collection whatever it is." The reason is, that the celebrant *a priori* renounces his right to the excess. This is not contrary to Canon 840, § 1; because any celebrant of a Mass may renounce a part of the stipend to the donor voluntarily, or even say a Mass *gratis* if he wants to.

[16] Can. 827: "A stipe Missarum quaelibet etiam species negotiationis vel mercaturae omnino arceatur". See also "Pastor's Right To Share In Assist-

course, the written law in its full rigor. The Roman authorities, even after the promulgation of the Code, have repeatedly insisted that this canonical provision concerning Mass stipends should be observed.[17] On the contrary, a pastor, before leaving for a longer or shorter vacation trip, may enter a gentleman's agreement with his assistants or a substitute: "*favores sunt ampliandi*"—during my absence, pay the usual house expenses, and the balance is yours for your extra work and responsibility.

But the pastor may not claim anything for the trouble or favor of transferring special Masses to be said by another priest either in his parish church or somewhere else, v.g., a month's mind or anniversary high Mass; a series of Gregorian Masses for which he received forty-five instead of the usual thirty dollars, with the special permission of the donor that he may transmit them somewhere else without delay. For the words of the above quoted Canon 827, concerning the prohibition of all negotiation or trading in Mass stipends, are applicable also to this case. And Canon 840, § 1 states: "A person who transmits manual stipends[18] to others is bound to send the entire stipends as he received them, and cannot retain part of them, unless the giver explicitly permits the retention of a part of the stipends, or unless it is certain that the excess above the ordinary stipend as fixed by the law of the diocese was given as a personal gift" (*intuitu personae*).[19] The pastor is forbidden to make any profit from Mass stipends,[20] whether they are said in his church or have been forwarded somewhere else, but he may deduct the expenses he incurred in forwarding them.[21] In view of these canonical regulations, therefore, he is obliged to give to the other

ant's Stipend", *Ecclesiastical Review*, XCIV (1936), 529-531;XCVIII (1938), 69-72.

[17] See below footnotes 19, 20, 21.

[18] We are here concerned only with manual Masses and stipends. Foundation Masses (*ad instar manualium*) follow the regulation of Canon 840, § 2. In Europe there are many churches in which the salary of priests is made up from the income derived from a sum of money bequeathed or donated for founded Masses.

[19] This is a literal translation by the writer of Canon 840, § 1. Cf. also footnote 22.

[20] S.C.C., 21 nov. 1898—*A.S.S.*, XXXI (1898-1899), 623-624.

[21] S.C.C., *Bredanen.*, 25 febr. 1905, ad II—*A.S.S.*, XXXVIII (1905-06), 15-20, *praesertim* p. 16 et 20.

priest the total amount of forty-five dollars which he received for the Gregorian Masses mentioned above as an example.[22]

In Italy, France, and some other European countries, a notice is frequently posted in the sacristy beside an offering box with the inscription, usually in Latin, *Pro vino et cera*. Of course, the pastor or the rector of a church is entitled to some alms for the wine and candles used by the visiting priests saying Mass there; due to the fact that a number of strangers say Mass there every day, he has to buy an extra supply of Mass wine and candles; the vestments have to be more frequently mended; altar linen more often bought, washed and repaired; the altar boys, who must attend every morning at various hours, are entitled to a larger remuneration at the end of the week or month; the sacristan also deserves additional pay for his extra work. This is especially true in regard to large port cities, shrines, and the many basilica-churches in Rome, where from ten to fifty priests or even more [23] say Mass every day. It is only just and fair that every celebrant should contribute a small voluntary offering, ten or fifteen cents, for this purpose. The bishop of the respective diocese can even make it imperative in the form of a definite fee, v.g. ten or fifteen cents per Mass for strangers, in order to defray these extraordinary expenses of the pastor or rector of these churches.[24] The bishop may rule that the fees thus received will form a sacristy fund, from which the pastor or the rector

[22] S.C.C., *Montisvidei*, 16 apr. 1921—*A.A.S.*, XIII (1921), 532-534. The donor of the Gregorian Masses is fully aware that it is hard to find a priest who could commence saying them immediately, even in a monastery. The excess, therefore, is given *intuitu celebrantis*.

[23] For instance, in Lourdes there are some forty altars in the upper basilica, and about as many in the lower church. Masses begin there at 4:00 A. M. and continue up to about 1:00 P. M. The vestments remain on the altar; some three, four or even five priests wait for their turn to say Mass. A bottle of Mass wine and a sufficient supply of altar breads is also on the credence. We may imagine how much in the way of Mass wine, candles and altar breads has to be supplied every day. The same situation is found at other shrines, the various basilica churches in Rome and other places.

[24] In some European dioceses, especially in port cities, such a common offering box is found in the sacristy with the inscription: *Eleemosyna pro vino, cera et pueris*. In the city of Le Havre, France, in 1937, the Bishop ordered the removal of such a box from the Cathedral sacristy, censuring it as improper to demand a fee of that kind, as told to the writer by the sacristan of that place. The celebrant, however, may give a voluntary offering to the sacristan and the altar boys individually.

of the church or shrine may take, v. g. sixty per cent for Mass wine, candles, vestments and linen expenses; twenty per cent for the sacristan to pay him a decent extra salary every month; the other twenty per cent to be accumulated as an altar-boys' fund, from which their cassocks and surplices may be bought, mended and washed. Such a regulation, or one similar to it, made by the bishop, would entirely come within the frame of canon law, because there are involved extraordinary expenses, extra work, and inconvenience for the accommodation of so many visiting celebrants.[25]

Ad 2.) *Acts of voluntary jurisdiction* in our case comprise the issuing of various certificates, v.g. of baptism, confirmation, burial, marriage, and school attendance, as well as dispensations of all kinds, all of which are executed in the parish office by the authority of the pastor and usually under the parochial seal. The fees received in this connection belong to the pastor according to Canon 463, § 3, although the clerical work in issuing such documents may have been performed by another, v.g. the assistant or a substitute priest.

There is no doubt, that the bishop of the diocese also may regulate all such fees, making a general norm for the entire diocese. In fact, the amount of such fees is stipulated in some dioceses with the concession to the pastor of a right to demand them from those who can afford to pay. The poor, of course, are always to be exempted.[26] There seems to be nothing out of place in fixing a certain amount for these documents due to the fact that it generally involves more than the mere transcription, v.g. a search to find such a record in the old baptismal records of the parish. If a certificate is sought from a court or municipal clerk, a stipulated fee must be paid. In some instances, the pastor or his assistant are kept busy for several hours of the day writing out such certificates for young persons who have completed the eighth grade or a parochial high school, and are looking for employment. These youths usually spend money on trivial things; they should also be willing to pay a small fee for the certificates to be issued for them. In some of our

[25] Strange to say, in St. Peter's Basilica in Rome, there also is a great gathering of celebrants every day, but no offerings *pro vino et cera* are demanded, nor is there any offering-box for this purpose, or any other for any purpose—at least, the writer did not see any there during his sojourn at Rome.

[26] Cf. can. 463, § 4 cum can. 1909, § 1, 1914: "Pauperes . . .".

larger city parishes, it is usually the job of the assistant who is hebdomadarian [27] to perform this often unpleasant task.

And it is exactly here that a gentleman's agreement nicely fits in. We all know that in the larger parishes such accidental fees in the parochial office will amount to a considerable sum each year, v.g. between one hundred and three hundred dollars. Suppose that most of this clerical work, or even all, is performed by one or two assistants in turn. They know that all these perquisites belong to the pastor according to Canon 463, § 3. They do not even dare to say a word about it, but faithfully keep an account of money received and hand it over to the pastor at appointed times. It would certainly be a gentleman's act on part of the pastor to say: "Well, Fathers, you are doing so much extra work in the parish office, attending to all the sick calls; you also have to pay for the gasoline in using your cars [28] to make those trips to the distant hospitals, I am relieved of the trouble of telling you about the parish work to be done, even when I am absent. Well, we shall split all these extra revenues and all the *iura stolae* into three equal parts. I want you to feel happy about it". Let us say that every assistant would receive in this way every month an extra stipend of between ten and fifteen dollars in addition to his usual salary and Mass stipends. He would, no doubt, appreciate his pastor's generosity, as well as the latter's fatherly sentiments towards him and the gracious recognition of all the extra work done. Such a kind pastor has no trouble in making his assistant feel at home; in stimulating his zeal faithfully to attend to his duties in the church, the school, and the visitation of the sick. So far from the pastor's needing to request the bishop to remove such an assistant, the assistant himself will plead with the bishop to allow him to stay with his beloved pastor, because removal would be like losing his home. The very fact, that some assistants are anxious to stay with a certain pastor as long as

[27] In some larger parishes where there are several assistants, one takes care of the parish office work in turn each week, while another cares for all the sick calls.

[28] The Diocesan Statutes of the various dioceses in the United States determine the use of automobiles by the assistants. In some dioceses, for instances, they are not allowed personal ownership of an automobile. The pastor is permitted to have one, and is entitled by the Diocesan Statutes a certain allotment directly from the church treasury for its upkeep and for transportation expenses incurred in the parish work, whether used by himself or the assistant, v.g. on sick-calls.

they may, perhaps for five or more years, until they are promoted to the office of pastor according to the prevailing custom or necessity of the respective diocese, is the best evidence that the pastor is a " homo Dei " with a gentleman's agreement. He will be respected by the bishop, because the latter hears no complaints from the assistant or assistants. He will be revered by the clergy within the diocese and far abroad, because all the former assistants will always speak well of him, and even defend him, should anyone dare to say anything uncomplimentary of their beloved pastor. The parishioners themselves will notice and extol this fact, that every assistant in their parish stays as long as the diocesan circumstances permit.[29]

II. Parties Concerned in Canon 463, § 3

" If any of the parochial affairs are discharged by another priest." The words of this paragraph are broad, and may denote:

1. an assistant in the canonical sense as in Canon 476.
2. a substitute according to Canons 465, §§ 4 et 5; 474; 1923, § 2.
3. a religious priest who helps out in the sacred ministry at weekends;
4. a supernumerary priest employed at the will of the pastor.

Ad. 1. Assistant priests,[30] quite often called also curates or assistant pastors in this country,[31] are appointed by the Ordinary to a pastor, if the pastor alone cannot take care of all the work of the parish on account of the great number of parishioners [32] or for other

[29] There is no doubt that in nearly every diocese such instances are to be found, and they speak for themselves.

[30] The canonical term for them is *" vicarii cooperatores"*, and to them refers Canon 476. In the previous five Canons other vicars are described: can. 471: *de vicariis paroecialibus;* can. 472: *de vicario oeconomo;* can. 474: *de vicario substituto;* can. 475: *de vicario adiutore.*

[31] In some European dioceses they are called chaplains, because quite often they are given to the pastors for a temporary need, v.g. to take care of a filial church or a chapel during the winter months, or during Lent, etc.—The term " chaplain " is thus employed for all assistant priests in Germany; in France: vicaires; in Holland: Kapelanen, onderpastoors.—Vermeersch-Creusen, *Epitome,* I, n. 520.

[32] According to the unanimous opinion of some canonists of the pre-Code era in Europe, 1,000 souls or about 250 families were considered a great number of parishioners. Whenever the number reached about 1,100 souls, the pastor was obliged to have an assistant. The presumption was that he cannot alone do justice to all his parochial duties. This old rule seems also applicable to our parishes in this country, especially in rural districts, due to their vast territory and to the time lost in traveling.

reasons.[33] In these cases, as provided by the Code, the Ordinary shall give him one or more assistants, called in law the *vicarii cooperatores*, who shall receive a proper salary. The bishop may even require a pastor to accept an assistant.[32-bis] The assistants may be appointed either for the entire parish or for a certain specified part of it.[34] The bishop, not the pastor, has the right to nominate the assistants of the secular clergy, after having given a hearing[35] to the pastor.[36]

The Holy See has declared that, notwithstanding any custom to the contrary, the rule of this Canon demanding that the Ordinary consult the pastor before assigning assistants[37] to him must be observed.[38]

The assistants are obliged to reside in the parish[39] according to the Diocesan Statutes,[40] or laudable custom,[41] or the mandate of

[33] For instance, there might be one or even two mission churches within the parish limits, or the pastor might be advanced in years.

[32-bis] S.C.C. (14 aug. 1863, *Fontes*, n. 4195): "An possit episcopus cogere parochum ad assumendum sibi unum aut plures vicarios, prout id necessarium iudicaverit?—Resp. ad 1: Affirmative, ad tramitem tamen cap. IV, Sess. 21, *de reform.*, Conc. Tridentini."

[34] This is based on the European arrangement where they have quite often a filial church called in Canon 1427, § 1, *vicaria perpetua*.

[35] The pastor might have some serious reason when answering the bishop for objecting to an assistant, v.g. because he does not know sufficiently the language of the people, or because he is sickly and not of much help to the pastor, etc.

[36] The wording of this entire paragraph is based on Canon 476, §§ 1-3.

[37] Cf. S.C.C., *Zagabrien.*, 13 nov. 1920—*A.A.S.*, XIII (1921), 43-46.

[38] The S.C.C. ruled that contrary custom must be abolished according to Canon 5, "*et standum dispositioni Codicis, can. 476, § 3.*"

[39] I.e., whenever they are appointed by the bishop officially "*vicarii cooperatores*", because their office demands that they be always at hand to take care of their work in church, sick calls, etc.

[40] This norm refers to particular law to be enacted after the promulgation of the Code.

[41] There is just one footnote to the entire paragraph 5 of Canon 476, which quotes: S.C.C., *Sublacen.*, 13 iul. 1743, ad 1—*Fontes*, n. 3556. The question was asked: "An capellania S. Iosephi in Terra Cameratae sit simplex vel residentialis?—The Sacred Congregation answered: "Negative ad primam partem, et affirmative ad secundam". The obligation of residence was declared imperative in view of the *cura animarum*.

the bishop.[42] The bishop should prudently arrange that the assistants live in the same house with the pastor,[43] as Canon 134 desires a community life of the clergy.[44]

The rights and duties of assistants depend on Diocesan Statutes, the bishop's letter of appointment and the commission of the pastor. Unless the contrary has been explicitly stated,[45] the assistants must[46] help the pastor in the general ministry of the parish, with the exception of the Mass for the congregation.[47] The assistants are subject to the pastor who shall paternally instruct and direct them in the care of souls, watch over them, and send each year a report to the bishop concerning their conduct.[48]

These are the canonical regulations as they are now incorporated into Canon 476. Some of these provisions are entirely new; others are taken from the Decretals, but modified in many ways and adapted to present circumstances in the various countries, but in the form of general norms, thus leaving to the bishops of individual

[42] Canon 476, § 5 states: "...aut Episcopi praescriptum", which denotes a particular law, norm, rule. See: Forcellini, *Lexicon*, s.h.v.

[43] In some European dioceses the assistant or assistants have a separate house for themselves. Canon 476, § 5 uses rather a persuasive form: "... Curet Ordinarius ... ut in eadem paroeciali domo commoretur".

[44] This is a reference to the Decretals of Gregory IX, and quoted as: c. 9, X, *de vita et honestate clericorum*, III, 1.

[45] Vermeersch-Creusen, *Epitome*, I, n. 522: "Illa enim verba dependentiam Vicarii a parocho, non eius potestatem definiunt". An assistant may have the usual Faculties of the Diocese, and yet they may be limited by the pastor's commission, v.g. to assist at marriages according to Can. 1094, at least *quoad liceitatem*.

[46] Can. 476, § 6 uses the word "*debet*" which means an obligation.

[47] If he offers this Mass, he is entitled to a Mass stipend according to the schedule of the Diocesan Statutes.

[48] S.C.C. (*Brixien.*, 24 iul. 1875 — *Fontes*, n. 4232): "Capellanis ius esse exercendi curam animarum una cum Praeposito et dependenter ab ipso: iuxta ordinationem ab Episcopo proponendam, et ad S. Congregationem transmittendam". Even now, in some extraordinary cases, the Roman authorities will instruct the bishop to watch a certain priest and report about him every year, v.g. if he is suspected of heresy, of modernism, or of a *doctrina non tuta*. It is the Sacred Congregation of the Holy Office which issues an information to the local Ordinary which when first given will be in this or a similar form: "Sacerdos N.N., ob denuntiationes factas contra eum ... *observetur;* the second time it will be: *observetur attentius.*

dioceses some latitude for local adjustment according to praiseworthy custom and their prudent judgment.[49] This Canon 476, having eight paragraphs, though it is one of the longest [50] in the Code, has only few footnotes to the various paragraphs. Paragraphs 2 and 8 of this Canon have no footnote whatsoever; therefore they are something new that did not exist in the pre-Code legislation.[51]

Canon 476, § 1, contains also this important phrase in reference to our matter: "... eidem (parocho) detur unus vel plures vicarii cooperatores, *quibus congrua remuneratio assignetur*". The Supreme Legislator of the Code desires, where no endowment for assistance has heretofore existed [52] that a fair remuneration be assigned in the form of a salary [53] by the Diocesan Statutes or by the bishop of the respective diocese. In the United States, nearly all our parishes do not have a sufficient and stable endowment according to Canon 1410,[54] and for this reason are governed by Canon 1415, § 3,[55] according to which the parishes are kept up by various and necessary revenues. All the moneys received in behalf of the church, the school and the parish go into the church treasury, and from this treasury the salaries of the pastor, the assistants, the Sisters, the janitor and other employees are paid.[56] As stated already in

[49] Most of our heretofore existing customs are embodied in the decrees of the Second and Third Plenary Councils of Baltimore.

[50] Due to the fact that it contains all canonical regulations concerning assistants in canonical terms.

[51] The absence of footnotes to a respective canon or a paragraph of a canon is a sign that it is entirely new, because it had no precedent in the pre-Code legislation.

[52] In some European countries, v.g. in Germany, Austria, and Poland, there existed endowments for the pastors' assistants. In France, Belgium, government pensions constituted the canonical subsidy for assistants.

[53] Taken from the church revenues: pew rent, Sunday collections, etc.—Leo XIII, const. "*Romanos Pontifices*" 8 maii 1881—*Fontes*, n. 582, §§ 23-26, and in footnote to can. 630, § 3. See also: can. 1182, 1525; Conc. Baltimorense III, nn. 275-278. Conc. Baltimorense II, n. 184.

[54] This Canon refers to the manner of endowing benefices .

[55] This paragraph is also entirely new and allows a great deal of latitude to the local Ordinary in countries like the United States to establish new parishes and quasi-parishes (the latter in mission territory): "si prudenter praevideat ea quae necessaria sunt aliunde non defutura".

[56] According to the regulations of the bishop as in can. 1519, § 2.

the previous paragraphs, all the fees or offerings in the form of *iura stolae* belong to the pastor according to Canon 463, § 3. The regulation of the Second Plenary Council of Baltimore,[57] according to which marriage and baptismal fees were divided between the pastor and his assistant as part of the latter's adequate support, is not applicable *per se* according to the Code, unless *per accidens* the bishop of a diocese judges that, for the time being, the circumstances of time, persons and localities do not warrant any other plan of providing financial resources [58] for the support of the parish itself, of the pastor and of his assistant, than one like the following. All such fees, offerings and all revenues whatsoever are deposited in the church treasury,[59] and then, after the current expenses are met for interest, fire insurance, fuel, and other items of maintenance of the church plant, as well as for the living expenses of the pastor and his assistant, from the sum left over at the end of the year, the pastor is permitted to draw a certain sum, for instance, five hundred dollars for himself and three hundred dollars for his assistant, as an annual salary, not counting regular Mass stipends.[60] An immemorial custom, differing even to this extent from the particular law of the Baltimore Council, would justify the bishop, in virtue of Canon 5, to retain the plan until such a time, when other sufficient revenues v.g. pew rent, Sunday collection or membership dues, will guarantee resources for a division *ex aequo et bono* to provide sufficient support of the church plant, a distinct salary of the pastor, and a distinct salary of the assistant,[61] with an allowance for the assistant's board.[62]

[57] Conc. Baltimorense II, n. 94.

[58] This is still the case with some dioceses in the Great West, where the conditions are unsettled, and people are coming and going; especially during the depression, and the long drought in both the Dakotas and Montana, when people had to migrate to other States was this condition intensified.

[59] This system of support still prevails in some dioceses in the Great West, enacted even by Diocesan Statutes.

[60] Cf. S.C.C., *Montisvidei* et *Aliarum*, 10 ian. 1920—*A.A.S.*, XII (1920), 73: ". . . parochi cooperatoribus suis mercedem solvant . . . adiecto quotidie Missae stipendio integro iuxta taxam . . . ".

[61] Cf. The Jurist, I, (1941), 341-344.

[62] Cf. Conc. Baltimorense III, n. 273. The Diocesan Statutes or a bishop's decree should fix the amount for the assistant's board plus a regular salary per year.

Ad 2. A substitute according to Canon 465, § 4 and 5, and Canon 474 is a priest who, with the approval of the Ordinary, takes care of parish affairs during the pastor's absence, when he leaves the parish for more than a week. According to Canon 474, a substitute has all the rights of the pastor as to the care of souls, unless the Ordinary or the pastor should restrict his power.

The Pontifical Commission for the Interpretation of the Code has decided that a substitute may validly and licitly assist at marriages *only after* the approval of the Ordinary, and provided that no restriction has been made; but not before the Ordinary's approval.[63]

A pastor of a religious community, of course, needs the permission of his legitimate Superior also for his absence.[64] An assistant, appointed to aid him by his legitimate Superior, also needs the approval of the local Ordinary for assisting at marriages validly and licitly.[65]

A *sacerdos supplens,* mentioned in Canon 465, § 5, is a priest who replaces a pastor whenever he is compelled to leave suddenly for more than a week, has notified the Ordinary about his unexpected leave by a letter, and indicated the priest whom he has asked to take care of his parish in the meantime, v.g. a pastor of the neighboring parish. This *sacerdos supplens,* after the Ordinary has been notified, may validly and licitly assist at marriages even before the approval of the local Ordinary.[66]

On this point, the Diocesan Statutes of the respective diocese must be consulted. In many instances, they define which priests may, besides the pastor and a priest delegated by him expressly, according to Canons 1094 and 1095, § 2, assist validly and licitly at a marriage within the respective parishes, who only validly but not licitly,[67] and who neither validly nor licitly without a proper delega-

[63] Pont. Com. C.I.C., 14 iul. 1922—*A.A.S.*, XIV (1922), 527-528.

[64] Can. 465, § 4: "...quod si parochus sit religiosus, indiget praeterea consensu Superioris et substitutus tum ab Ordinario tum a Superiore probari debet".

[65] Pont. Com. C.I.C., 14 iul. 1922, solutio ad can. 465, §§ 4 et 5, ad 3—*A.A.S.*, XIV (1922), 527-528.

[66] Unless a certain restriction has been made by the local Ordinary after he has received notification and provided that the *sacerdos supplens* is in good standing.

[67] Some Diocesan Statutes specify: All priests affiliated with a parish and having the "Faculties of the Diocese" may validly assist at marriages in that parish; licitly only whenever delegated by the local Ordinary or the pastor of that church.

tion from the Ordinary or a legitimate pastor according to Canon 1094. In some instances, the Diocesan Statutes also define which priest is a substitute [68] or a *sacerdos supplens* in cases of emergency.[69]

A substitute [70] or a *sacerdos supplens* [71] has a right to the usual Mass stipend according to the schedule of the Diocesan Statutes, when he celebrates a Mass in the church of the absentee, v.g. a funeral or a wedding Mass, and the people's Mass on Sundays and other days of obligation, if the absentee instructed him to say it.[72] He is entitled also to traveling expenses [73] and to a just remuneration for services rendered according to the prevailing custom of the respective diocese.[74] He does not, however, have a right to the *iura stolae* which, according to Canon 463, § 3, belong to the pastor.

Here again is the place for a gentleman's agreement. Suppose that a substitute or a *supplens* is a pastor from the neighboring parish, some three, five, or even ten miles away; that he is called around midnight to the absentee's parish several times within a week, in the midst of a snowstorm or sleet and over icy roads; and even that as a consequence he drove into a ditch and caused damage to his automobile. Or suppose that the *supplens* is a priest from a religious community a hundred miles away and that he is usually a member of a missionary band, but for the time being, due to his supplying the place of the absent pastor, cannot be engaged for a mission or retreat. It is only just and fair in either case that the

[68] V.g. the first assistant of St. Mary's church; or the pastor of St. Joseph parish of Smithville will act as a substitute for St. Francis parish of Irwin, and *vice versa*.

[69] A religious priest from a nearby monastery, or the chaplain who is assigned to St. Mary's hospital at Cassville, will be *supplens* for parishes *A* and *B* in emergency cases.

[70] A substitute is called *vicarius substitutus* in Canon 465, § 4.

[71] A *sacerdos supplens* is spoken of in Canon 465, § 5, in cases of emergency; therefore as distinct from a *vicarius substitutus*.

[72] Cf. can. 466, §§ 4, 5; can. 476, § 6.

[73] The refund of traveling expenses is based on principles of justice, and a tacit contract, *do ut des*, because nobody is conceived to assume the obligation of paying them from his own pocketbook in such instances.

[74] In many dioceses the pastor, commencing a vacation trip, makes an agreement with a substitute *a priori* as to his reimbursement in such a way that the substitute becomes the beneficiary of all net income of the absentee.

pastor, upon his return home, should allow him the pastor's salary *pro rato tempore*, the *iura stolae* and the Mass stipends for the Masses said in the absentee's church, deducting only the usual and current expenses for the upkeep of the kitchen and household. And most pastors are gentlemen in this regard; they manage this way; and, as a consequence, they have no trouble in getting a substitute during their vacation trip or in cases of emergency at any time.

Ad 3. In many instances, a pastor does not need any assistant on week days, because the bulk of confessions are heard on Saturday afternoon and evening or, in farm districts, on Sunday morning between the Masses. In larger city parishes, one or two assistants can take care of all the pastoral work on week days; extra help is needed from Saturday noon to Sunday noon for confessions and the scheduled Masses on Sundays. In order to meet these situations, the pastors of such parishes engage a priest, usually from a religious community, for the week-ends.

In many instances, the pastors are gentlemen in paying for such services "*ex aequo et bono*". With the consent of the bishop,[75] they assign a regular assistant's salary to such a priest, plus an extra *honorarium* for special services, v.g. for preaching a ten-minute sermon at Masses not celebrated by him; for celebrating the last two Masses every Sunday;[76] or for assisting in hearing the numerous confessions on the first Thursday of the month. The people of the parish certainly appreciate such an extra convenience, and gladly approve the pastor's fairness in paying what is just and right for such additional sacred ministry.

Ad 4. A supernumerary priest employed at the will of the pastor[77] deserves special mention in this connection. As the words indicate, he is not assigned or affiliated with a parish church for the

[75] According to Canon 1519 and the regulations of the Diocesan Statutes or the bishop in particular cases, the pastor cannot make any payments from the church treasury without the consent of the bishop, especially when there is a question of paying an extra salary for a supernumerary assistant priest or regular help in the sacred ministry throughout the whole year. In some dioceses the bishops themselves define how much the pastors should pay for such help "*ex aequo et bono*."

[76] To fast till noon every Sunday and preach at the last Masses certainly has to be considered extraordinary work, deserving extra remuneration.

[77] *Ad beneplacitum pastoris*, with no obligation whatsoever on the part of the bishop or the parish. The pastor will obtain for such a priest the general "Faculties of the Diocese".

benefit of the parish in the *care of souls,* but rather helps out whenever the pastor needs him. Due to the fact, that he is not needed *per se* for parish affairs (*paroeciale aliquod officium*), or approved by the bishop of the respective diocese as an assistant or auxiliary to the local pastor in the sacred ministry, there can be no question of his services as being rendered *ex quasicontractu,* or of remuneration *ex iustitia.* There is, however, plenty of room for a gentleman's agreement in such cases.

In many instances, there is a pastor emeritus, a refugee-priest or a diocesan priest temporarily without an assignment [78] to a church in the diocese, who looks for shelter and honest sustenance from a pastor of a large parish. Strictly speaking, the pastor does not need his help; but looking at things broadly, the visiting priest may become useful for the service and convenience of the parishioners, v.g. to provide a regular early Mass, to distribute Holy Communion to the Sisters and the early daily communicants who have to go to work; to hear the daily confessions in church before the scheduled Masses; to say the last Mass on Sundays, etc.[79]

The status of such a supernumerary priest and his title to some remuneration *ex congruo* [80] depends entirely upon a gentleman's agreement on part of the pastor. If such a supernumerary diocesan priest, or a war refugee, or a pastor emeritus is really helpful in the sacred ministry to the local clergy, if the parishioners really appreciate such extra services of convenience, there is no reason why a kind pastor's word of recommendation to the bishop would not have its effect. The bishop could permit the pastor to assign to this supernumerary priest a fitting salary to be paid directly from the church treasury, as well as the allowance for his board according to the Diocesan Statutes especially when the parish is in a good financial condition; or at least the latter. In the latter case the pastor should offer him a Mass stipend every day at the convenience of the pastor, occasionally inviting him to celebrate even a high

[78] In some instances, a pastor has been deprived of a parish, and the bishop tells him to make his home with some one of his priest-friends within the diocese, assisting him in the sacred ministry at the will of the pastor.

[79] In some larger parishes, the pastors are glad to have such a supernumerary priest for such services of convenience, and they find means and ways to reimburse him *ex aequo et bono.*

[80] *Ex congruo* only, and not *ex iustitia,* because he is not appointed or designated by the bishop for the care of souls in this particular parish church.

Mass or a funeral or wedding Mass, thus making up a bulk income of at least fifty dollars per month.[81] A kind pastor in a large parish will always find some means of making a gentleman's agreement in similar cases, and of improving the lot of his unlucky fellow priest.[82]

The writer is aware of some instances, where a pastor and a supernumerary priest made a mutual agreement of this kind: "You may stay with me and help me out in the sacred ministry, whenever needed. The parish cannot afford to pay you a regular assistant's salary or any allowance for board from the church treasury. You will say Mass every day according to my intention whether it is a low or high Mass, a funeral or a wedding Mass. At the end of every month you will receive a net sum of sixty dollars in addition to board." What about such a mutual stipulation? The answer is: that in view of the many and various decrees, issued at various times by the Apostolic See, a pastor has no claim to any part of a stipend for a Mass offered by any priest in the parish church, and the celebrant is not bound to turn over any part of a stipend for a Mass which he celebrates.[83] Even in dioceses where a centenary or immemorial custom of this sort exists, and, in the judgment of the Ordinary, cannot prudently be abolished, it may be only tolerated. If, however, the custom is not centenary or immemorial, it cannot be tolerated, according to Canon 5, which is definitely against it. Where there is no custom or positive diocesan regulation to the effect that the excess of a larger Mass stipend or a certain percentage of it should be considered as part of the assistant's board,[84] it can not be permitted by the bishop and no pastor is jus-

[81] A net income of fifty dollars a month plus free board is, no doubt, a fair sustenance for a priest; even pastors in small parishes have no more after paying all their expenses.

[82] In nearly every diocese, we find such Good Samaritans.

[83] S.C.C., *Bredae*, 25 febr. 1905—*Fontes*, n. 4321; 27 febr. 1905—*Fontes*, n. 4322; 10 ian. 1920—*A.A.S.*, XII (1920), 70-73.

[84] Cf. *A.A.S.*, XII (1920), 70-73, according to which some dioceses have obtained indults to this effect. The Apostolic Administrator of Montevideo, however, proposed an identical case to the Sacred Congregation of the Council asking whether such a custom may be tolerated in the future, although contrary to Canon 827 and 840. The Sacred Congregation of the Council answered: Propositam consuetudinem remunerandi coadiutores vicarios tolerari posse. Et ad mentem. Mens autem est, quod "Administrator Apostolicus

tified in adopting any such practice, notwithstanding any extrinsic title.[85]

In view of the above stated principles, a supernumerary priest is entitled to the full Mass stipend for every Mass he celebrates in the Good Samaritan's church, whether it is a low or high Mass, a funeral or wedding Mass, according to the schedule in the Diocesan Statutes. On the other hand, the Good Samaritan, even in a large parish, may demand payment from him, say some thirty dollars per month, for his board. Of course, the pastor may give him free board or even extra and congruous remuneration for extra services, dependent as to source of payment on whether they are rendered out of necessity and in behalf of the parish, or only out of convenience to the pastor; in both cases, there is room for a gentleman's agreement to the satisfaction of both parties. If they are rendered in behalf of the parish and out of some necessity to give the parishioners better services, v.g. to introduce an additional early or late Mass for at least twenty people who would otherwise miss holy Mass on Sunday, because they must report for work early in the morning, there is adequate reason to allow this supernumerary priest, with the Ordinary's sanction, a sufficient sum, say, thirty dollars per month, to cover the expenses of his board.[86] If, however, the services are only part of the pastor's duty or burden, this pastor could not, in justice, charge the supernumerary's board to the parish.

There are, however, many other ways and means to provide a sufficient fund for such a supernumerary's board, v.g. by entrusting to him the preaching of the Forty Hours' devotion; or at intervals during the year novenas and retreats for the married people, the young men, the young ladies of the parish, etc. From the collections received during these various exercises, the pastor could obtain a sufficient amount to cover the supernumerary's board, and even some extra remuneration for his extra work, without casting any burden on the parish or on his personal wallet.

operam navat ut in praxi ponatur statutum dioecesanum vi cuius parochi cooperatoribus suis mercedem solvant . . adiecto quotidie Missae stipendio integro iuxta taxam".

[85] The aim of all the previous decrees, embodied now in Canon 827 and 840, is to do away with all and any commercialism and profit-making on Mass stipends.

[86] From experience we know that a collection taken up during such an extra Mass will bring in more than the celebrant's *honorarium*.

In any event, the supernumerary priest cannot claim fees or offerings made for parochial affairs (*officium paroeciale*) discharged by him; they belong to the pastor according to Canon 463, § 3, unless it is certain that those making the offering wished to give him the surplus of the sum that is over and above the ordinary tax.

A copy of the recently published Diocesan Statutes of the Diocese of Toledo, Ohio,[1] takes cognizance of this situation. The author is gratified in seeing in them for the first time positive synodal regulation[2] as to just and equitable remuneration for the sacred ministry of a priest asked to assist on Saturdays only, on Sundays only, and on Saturdays and Sundays jointly. Due to the fact that this synodal regulation is very much to the point, we quote *verbatim* two correlative regulations from Toledo's Diocesan Statutes:

"No. 395. The salary of each assistant priest shall be $1,000 annually from which sum the pastor will deduct $500 for board, laundry and household expenses."

"No. 397. Priests who assist in parochial work on Saturday and Sunday and who receive no regular salary from another diocesan assignment shall receive fifteen ($15) dollars. If they assist Sunday only, they shall be remunerated with ten ($10) dollars; however, their traveling expenses should be added thereto."

It is also noteworthy to add that, according to the same diocesan regulations, a supernumerary priest and every other celebrant of a Mass is entitled to a full stipend without any deduction or subterfuge:

No. 389 (page 118): "The stipend of every Mass, including all high Masses, shall belong in its entirety to the celebrant of the Mass with the obligation, however, of paying $1, except for solemn Masses, for the service of the organist. This sum of $1 shall be

[1] Acta et Decreta Synodi Dioecesanae Primae, Excellentissimo ac Reverendissimo Carolo Josepho Alter, Episcopo Toletano, Convocante ac Praeside, A. D. 1941. They went into legal effect on January 1, 1942. Cf. pages 119, 120.

[2] Heretofore, the author was not able to trace any similar diocesan regulations of this kind in any other Diocesan Statutes within his search. The Most Rev. Bishop of Toledo, then, seems to be the first one in this regard to come forward with a positive diocesan regulation to this effect. His decision, no doubt, is based on the canonical principle: "*quod iustum et aequum est*".

paid to the pastor for the benefit of the organist and not for himself personally."[3]

Although the above stated regulations are obligatory only in the Diocese of Toledo, nevertheless they may serve also as an exemplar to other pastors in other dioceses, *servatis servandis,* when there is a question about the equitable remuneration of a priest who assists in large parishes during week-ends or on special occasions.[4]

The author of this article is confident that he expresses the sentiments of many Superiors of religious communities and of many supernumerary secular priests, who are called upon by pastors of larger parishes for spiritual help at week-ends, in suggesting a positive diocesan regulation to be issued by the bishops for their respective dioceses. They believe that it would produce more satisfaction to all parties concerned than the heretofore commonly accepted *" Gentleman's Agreement ".*

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CATHOLIC COOPERATION IN DIVORCE LEGISLATION

The fundamental obstacle to cooperation with committees on secular marriage law is that the Church would be exceeding its admitted authority, on the one hand, that is, in the matter of the marriage of pagans or the unbaptized; and on the other hand, would be conceding authority over the marriages of the baptized to the State. This obstacle exists, no matter what the type of law. Of course, it would not prevent a Catholic member of the legislature from exercising his right to vote for a law that would not be immoral.

But if any member of the hierarchy or any Catholic organization, or even a Catholic layman acting as a Catholic spokesman, endorsed any such law, the Church would obviously be indirectly involved. Because of this, Catholic intervention as such would seem to be a *causa maior,* reserved to the Holy See.

With regard to a proposal sometimes recommended, that the reasons for which divorce might be obtained should be taxatively

[3] This provision is entirely in accord with can. 831, § 1, and can. 827.

[4] In some dioceses, a universally accepted custom has already existed from time immemorial that pastors in large parishes should pay an *honorarium* for Saturday and Sunday assistance similar to that now specified in the Diocesan Statutes of the Diocese of Toledo.

printed in the contract signed by the spouses, it would seem to provide for more invalid marriages than we have now among non-Catholics. Such an enumeration would clearly suggest a condition *contra Sacramentum,* and parties who otherwise would have expressed matrimonial consent without thinking of divorce would be reminded to incorporate a condition in their consent. Moreover, in specifically authorizing divorce, such a statute would seem to be immoral, so that even a Catholic legislator could not cooperate formally or proximately in its enactment.

Other recommendations seem safe enough, perhaps even commendable; v.g. that the marriage contract be in writing and recorded; that waiver of divorce be suggested at the time of marriage and if made, be forever conclusive in all the States; and that divorce wherever granted be governed by the laws of the State of the contract. But as to them there remains the difficulty stated in the first paragraph. Surely, laymen can be advised as to the boundaries between marriage laws that are moral and those that are immoral. But active cooperation in the enactment of the laws seems impossible, certainly on the part of any representative of the Church of less authority than the Holy See.

JEROME D. HANNAN

CANONICAL PROVISIONS FOR SISTERS AS CATECHISTS

General Legislation

Canon 1336 provides that all religious, including those that are exempt, are obliged to observe the diocesan regulations of the Ordinary in the teaching of religion. Both clerical and lay religious institutes are bound by these prescriptions, regardless of the place where they are called upon to teach. Exempt institutes are free only when religion is taught their own subjects.[1]

Canon 1334 ordains that if the Ordinary of the Diocese is convinced that the help of religious is required for the catechetical instruction of the people, he may call upon the religious superiors, including those of exempt orders, to give such instruction either personally or through their subjects, especially in their own churches, provided the regular discipline does not suffer. In other words, all

[1] Cf. similar solution in S.C.Ep.Reg., March 16, 1866—*ASS,* II (1866), 157; S.C.C., March 2, 1861—*ASS,* II (1866), 186.

members of religious institutes—clerical or lay, exempt and non-exempt—may be called upon to teach by the Ordinary either in or outside their own churches or public oratories.

These canons are supported by the general provision of Canon 608 that Superiors shall see to it that their subjects give any necessary help to the Ordinary or pastor when such is required by the needs of the people, i.e., of both adults and youth. Such will include religious instruction either within or outside their own churches or public oratories.

Special Legislation

I. In his Motu Proprio, *Orbem catholicum,* on the teaching of Christian Doctrine throughout the whole world, issued June 29, 1923,[2] Pius XI says:

"... We beseech the devoted religious congregations of both sexes that not only they cooperate with their own Bishops within their own dioceses in this matter, but also make it their care in their colleges, to prepare alumni instructed in the various levels of the Catechism, that when they grasp Christian Doctrine more fully and wisely than is customary, they may be able to defend their faith against those things that usually oppose it, and may strive either to teach or persuade it to as many others as possible.

"This We very much desire, especially in certain centers of religious associations devoted to the instruction of youth, that there, under the guidance and leadership of the Bishops, schools be opened for chosen young people of both sexes and that these be formed by a suitable course of study, and their knowledge being examined, they be duly declared fitted to exercise the functions of teaching Christian Doctrine and Sacred and Church history. Let those who preside over religious houses make it their duty to choose from their members those whom they wish to attend Schools of this kind or to teach the precepts of religion to boys and girls."

II. Statuto della Venerabile Arciconfraternità della Dottrina Cristiana, January 30, 1928.

Article 35. "A norma del Codice di Diritto Canonico[3] in ogni parrocchia deve essere eretta la Congregazione della Dottrina Cristiana. Essa si compone di tutti coloro che con l'opera e con i mezzi coadiuvano il parroco per l'insegnamento della Dottrina Cristiana ..."

[2] *AAS,* XV (1923), 327. Translation by the writer.

[3] Canon 711, § 2.

(Translation: "According to the norm of The Code of Canon Law the Confraternity of Christian Doctrine must be erected in every parish. It is made up of *all* those who by their work or by contributions assist the pastor in teaching Christian Doctrine.")[4]

Article 34. "I religiosi e le religiose che impartono l'insegnamento catechistico in parrocchia o nei loro Istituti e Collegi, sono considerati come cooperatori nel territorio parrocchiale dell' opera catechistica, e possono, senza alcun detrimento delle loro costituzioni, lucrare le sante indulgenze, qualora il loro Istituto o Casa religiosa ne abbia ottenuta la partecipazione dall' Arciconfraternità della Dottrina Cristiana."

(Translation: "Members of religious communities, men and women, who impart catechetical instruction in a parish or in their Institutes or Colleges, are considered cooperators in catechetical work within the territory of the parish and can without detriment to their constitutions gain the holy indulgences whenever their Institute or religious House has obtained participation in the Archconfraternity of Christian Doctrine."[4]

III. Instruction of the Sacred Congregation of Religious to the Superiors and Superioresses General of Lay Religious Institutes on the Duty of Instructing their Subjects in Christian Doctrine, November 25, 1929.[5]

This Instruction contains the following provisions concerning the method for the giving of catechetical instruction to all members of lay religious institutes of men and women.

"...Since especially of late years many and various religious institutes of men and women have arisen; from whose works, if well done, the Church may rightly expect great fruit, this Sacred Congregation is especially solicitous in their regard, that the members of these institutes, of both sexes, be well taught in Christian doctrine, and that they may with all due diligence instruct in the same the boys and girls entrusted to their care.

"To this end, the Sacred Congregation, with the approval of the Holy Father, does by these presents decree:

"1. During their probationship and noviceship the young men and women shall renew their Christian doctrine and learn it more thoroughly, so that each one shall not only know it by heart but

[4] Translations are by writer.

[5] *AAS*, XXII (1930), 28. Cf. Canons 509, § 2; 565, § 2; 1382. The bishop has the right of vigilance and visitation in this matter.

also be able to explain it correctly; nor shall they be admitted to take the vows without a sufficient knowledge thereof, and a previous examination.

" 2. After the year of noviceship all the religious who are to be exployed in teaching Christian doctrine to boys and girls in primary schools, whether public or private, must be so trained both in the catechism itself and in the teaching of it to children, that they shall be able to pass an examination before the Ordinary or examiners delegated by him . . .

" 4. If, however, religious men and women are entrusted with the teaching of Christian doctrine to boys and girls, not in schools but in a parish, then they must take care to procure a testimonial of their fitness from the diocesan Curia." [6]

IV. Decree of the Sacred Congregation of the Council on the Promotion of Catechetical Instruction (*Provido sane concilio*), January 12, 1935.[7]

" And if the local Ordinary should request it, let not the collaboration of the religious (which Canon 1334 demands) be withheld in a work which is so salutary, so pleasing to God, and so necessary for the good of souls. When called upon, let these religious rejoice, nay, let them be eager for the call, so that in this part of the Lord's domain also, where the harvest is great but the laborers few, they may perform meritorious service for the salvation of souls."

V. Letter of the Sacred Congregation of the Council to the Bishop of Great Falls (Most Reverend Edwin V. O'Hara, D.D.), July 10, 1936.

". . . Quae Confraternitates, uti ex actis huic S. Congregationi transmissis cognoscere fas est, in hoc praecipuum munus intendunt ut omnes simul complectantur quotquot in singulis paroeciis catechismo docendo et fovendo sunt idonei, quique sollicita cura et statuta methodo pueros adolescentesque omnes catechisticam institutionem edoceant . . . Idem SS.mus D.nus et de iis quae hactenus acta sunt et de agendis isti Episcoporum Coetui vehementer gratulari dignatus est atque vota depromere ut tam feliciter incepta prospere cedant."

(Translation: " The Confraternity, as is clear from the acts forwarded to this Sacred Congregation, proposes as its special work to unite *all* who are capable of teaching and fostering catechetics in

[6] Translation by the writer.

[7] *AAS*, XXVII (1935), 145. Translation by the writer.

each and every parish and likewise all such who with diligent care and tried methods teach catechism to children and youth . . . His Holiness [Pope Pius XI] has deigned to congratulate earnestly this Committee of Bishops with regard to what has been done and what is proposed to be done, and furthermore to aid through his prayers this work, so that what has been so happily begun may continue to prosper." [8]

Thus there can be no problem as to whether Sisters are authorized under the law of the Code or under the policy of the Holy See to teach Catechism. They may even gain the indulgences of the Archconfraternity of Christian Doctrine when their house or institute is affiliated with it. The only question turns about the nature of the authorization. One view would regard catechetical instruction as public teaching, requiring a canonical mission. This, it is ready to admit, the Sisters are capable of receiving. It may be better to say with others that only diocesan approbation is needed, and that this can be given even tacitly though undoubtedly the bishop should be satisfied as to the competence of the respective teachers.[9]

JOSEPH B. COLLINS

CIVIL MARRIAGE LICENSE

Rudolph Schmidt and Ruth Geiger, both Catholics of my parish, are to be married tomorrow morning. Mr. Schmidt was married previously, but his wife was buried from my church and the record of her death is contained in our death register.

Today at rehearsal for the wedding, Mr. Schmidt presented to me the marriage license issued by the county and in that document it is stated that he was never married before.

I asked him why he made such a statement to the clerk at the court house. His answer was vague and he was very much embarrassed.

There are two problems involved: 1) is the license valid, issued as it was with false information, and may I proceed under it as duly authorized by public authority? 2) am I to suspect the possibility of the impediment of *crimen* from the perjury committed by Mr. Schmidt before the public official?

PAROCHUS

Canon 1016: Baptizatorum matrimonium regitur iure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus.

[8] Translation by the writer.

[9] Cf. Conc. Trident., Sess. XXIII, can. 7 and Sess. V, *de ref.*, c. 1. Coronata, *Institutiones*, II (1929), n. 914; Wernz, *Ius Decretalium*, III, 26.

Canon 1069, § 1: Invalide matrimonium attentat qui vinculo tenetur prioris matrimonii, quanquam non consummati, salvo privilegio fidei.

Canon 1075, 1°: Valide contrahere nequeunt matrimonium: Qui, perdurante eodem legitimo matrimonio, adulterium inter se consummarunt et fidem sibi mutuo dederunt de matrimonio ineundo vel ipsum matrimonium, etiam per civilem tantum actum, attentarunt.

Canon 1103, § 1: Celebrato matrimonio, parochus vel qui eius vices gerit, quamprimum describat in libro matrimoniorum nomina coniugum ac testium, locum et diem celebrati matrimonii atque alia secundum modum in libris ritualibus et a proprio Ordinario praescriptum; idque licet alius sacerdos vel a se vel ab Ordinario delegatus matrimonio adstiterit.

§ 2: Praeterea, ad normam can. 470, § 2, parochus in libro quoque baptizatorum adnotet coniugem tali die in sua paroecia matrimonium contraxisse. Quod si coniux alibi baptizatus fuerit, matrimonii parochus notitiam initi contractus ad parochum baptismi sive per se sive per Curiam episcopalem transmittat, ut matrimonium in baptizatorum librum referatur.

The Church has her own exclusive and completely independent jurisdiction for the regulation of all matters which concern the valid and lawful celebration of the marriages of baptized persons.[1] Because the marriage of baptized persons is a Sacrament,[2] the Church alone has received from her Founder, Jesus Christ, the authority to administer it. Consequently she has also the exclusive right to prescribe the conditions required for the proper celebration and reception of the Sacrament of Matrimony.[3]

Because of this exclusive competence of the Church, as determined by Christ, it follows that civil legislators, whether they be Christian or non-Christian, have no inherent or natural competency to establish diriment or impedient impediments for the marriages of baptized persons.[4] However, the civil authority is competent to legislate concerning those effects of Christian marriage which are known as "purely civil effects," that is, effects which are temporal and separable from the essence of marriage.[5] In order that the purely civil rights of the contracting parties in a Christian marriage

[1] Canon 1016.

[2] Canon 1012, §§ 1, 2.

[3] Cappello, *Tractatus Canonico-Moralis de Sacramentis*, III, *De Matrimonio* (4. ed., Romae, 1939), n. 57.

[4] Wernz–Vidal, *Ius Canonicum*, V, *Ius Matrimoniale* (2. ed., Romae, 1928), n. 59.

[5] Canon 1016. Cf. Cappello, *ibidem*, n. 71; Ottaviani, *Institutiones Iuris Publici Ecclesiastici* (2. ed., Civitate Vaticana, 1936), II, 210-213.

may be protected, the corresponding regulations of the civil law should be observed as a rule, unless the Church decides otherwise in a particular case.[6]

As they apply to marriages between baptized persons, civil laws may be considered under three aspects. First, if such civil regulations are contrary either to the divine natural or positive law or to the ecclesiastical law, they are unjust civil regulations. Further because they are unjust, they are thereby indirectly invalid laws. Such would be a civil law requiring for the validity of the marriage that Catholics be married civilly either before or after their marriage in the Church. It is obvious that *per se* such unjust laws cannot be observed by the contracting parties of a Catholic marriage. Furthermore, the justice or injustice of civil laws can be authoritatively determined by the Church alone as the supreme judge of morality.[7] Only if it were necessary to avert greater evils might it be permitted to observe an unjust civil law. Such permission would have to be sought from ecclesiastical authority in each individual conflict of the two laws.[8]

Secondly, if such civil laws are not contrary either to divine law or to ecclesiastical law, they are just laws.[9] Thus the civil authority is competent to decree the observance of prior or simultaneous or subsequent conditions in the celebration of marriages, even of baptized persons, in order that the contracting parties may enjoy the purely civil effects—temporary and separable—of the marriage contract.[10] As long as such laws do not prescribe anything that is forbidden by the Church and do not prohibit anything that the law of the Church commands or considers as valid and lawful, they must be observed in the marriages of Christians.[11] Such just civil laws may possibly be either valid or invalid. If they are within the competence of the civil legislator, they are valid, as well as just, and are, therefore, binding in conscience.[12] Thus the civil power may

[6] Cappello, *ibidem*, n. 69.

[7] Cappello, *ibidem*, n. 69. Such laws are distinct from those which are contemplated in canon 1063, § 3 and which refer only to the "purely civil" effects of marriage. Cf. also canon 1016.

[8] Cappello, *op. cit.*, III, nn. 69, 74, 732-733.

[9] Cappello, *op. cit.*, III, nn. 69, 74; Ottaviani, *ibidem*, p. 222.

[10] Cappello, *ibidem*, n. 71; Ottaviani, *ibidem*, p. 212.

[11] Canon 1016; cf. Cappello, *ibidem*, n. 71.

[12] Cappello, *ibidem*, n. 74.

legitimately prescribe that the fact of the celebration of a marriage between baptized persons in the Church be inscribed in the public records of the State.[13] In the United States this is usually effected by returning to the civil registry the civil marriage license duly executed by the assisting priest and attesting to the celebration of the marriage, with the result that such registration is considered as legal proof of the contracted marriage.[14] Such is a purely civil effect of the marriage contract and the law is a just civil law. It is likewise within the competence of the civil authority and is thereby also a valid civil law and binding in conscience. Similarly, the civil authority is competent to decree justly and validly that, if such registration of a contracted marriage is not effected within the prescribed time, the negligent contracting parties alone shall be punished by means of fines and other penalties.[15] The sanction of the law with such penalties is justified by reason of the will of the State that there be a public civil record of marriages validly contracted in the Church. Without such a public civil record very grave harm to the public good can well be feared.

However, such penalties cannot be applied for failure to register in the public records of the State a secret " marriage of conscience " which has been permitted by the Church for very grave and urgent reasons.[16] In this very rare type of marriage, such a law would be not only invalid, because it would exceed the limits of the competence of the State, but also unjust, because contrary to the law of the Church. Therefore, it would not be binding in conscience.

Furthermore, a marriage between baptized persons is considered to be validly and lawfully contracted from the date of its celebration in the Church. For the civil legislator to declare such validity to exist only from the date of registration of such marriage in the public records of the State would be not only an invalid civil law, because beyond the competence of the civil authority, but also an unjust law, because contrary to the law of the Church. Even the inseparable civil effects, for example, the legitimacy of children, must be considered to exist from the date of the celebration of the marriage and not merely from the date of registration of the mar-

[13] Cappello, *ibidem*, n. 71.

[14] Alford, *Ius Matrimoniale Comparatum* (New York, 1938), n. 413.

[15] Cappello, *ibidem*, n. 71.

[16] Canons 1104–1107; cf. Ottaviani, *ibidem*, p. 213.

riage in the public records of the State.[17] These matters pertain to the validity and to the essence of Christian marriage and it is therefore within the jurisdiction of the Church alone to legislate concerning them.

The civil authority can, however, decree that the "purely civil effects"—separable and temporary—exist only from the date of registration of the contracted Christian marriage.[18] Purely civil effects comprise particularly dower rights and the rights of hereditary succession. Civil decrees concerning them are just and valid laws and therefore binding in conscience.

The third type of civil laws concerning marriages between baptized persons are those which are just (not contrary either to divine or to ecclesiastical law) but are nevertheless invalid because they exceed the limits of the competence of the civil legislator. Such an invalid civil law would be one which requires for the marriage of baptized persons under twenty-one years of age the consent of their parents.[19] Civil laws of this type are not binding in conscience, neither of themselves nor because of any approval of them by the Church. Such general approval is never given by the Church to invalid civil laws. However, as a rule, such laws are to be observed in the marriages of baptized persons if they are not contrary to the divine natural or positive law. This obligation arises not from the invalid civil law itself but from the divine law of charity, that is, to protect the contracting parties and their children from grave loss and inconvenience. Consequently the instructions of the Church and the precepts of ecclesiastical authority must be followed in such cases.[20] However, in some instances, under special circumstances and with the decision reserved to the competent ecclesiastical authority in individual cases, it may be permitted and even necessary that a marriage between baptized persons be contracted without the observance of a civil law that is invalid but not unjust. This would

[17] Cappello, *ibidem*, n. 71; Gasparri, *Tractatus Canonicus de Matrimonio* (Civitate Vaticana, 1932), n. 239.

[18] Canon 1016; cf. Ottaviani, *ibidem*, p. 213. Cf. Hannan, "The Church's Province in the State"—*Ecclesiastical Review*, XCIII (1935), 556, 557; McDevitt, *Legitimacy and Legitimation*, The Catholic University of America Canon Law Studies, n. 138 (Washington, D. C., The Catholic University of America Press, 1941), pp. 62-64.

[19] Cappello, *ibidem*, n. 74.

[20] Aertnys–Damen, *Theologia Moralis* (11. ed., Taurinorum Augustae, 1928), II, n. 635; Ottaviani, *ibidem*, p. 222.

be exemplified in the case in which parents would unreasonably deny the consent required by civil law for marriages of baptized persons under twenty-one years of age. Provided that ecclesiastical diriment impediments either do not affect the parties or have been removed by dispensation, and provided that the contracted marriage could be registered in the public records of the State as required justly and validly by civil law to protect the purely civil rights of the parties, the ecclesiastical authority could for a just cause allow a marriage to be contracted without the observance of such an invalid civil law.[21]

In the case under discussion, there is question of the validity of a license in which it is falsely stated that the groom was never married before. Since it has been proved from the parochial registers of the deceased of the parish[22] that the first marriage was dissolved by the death of the first wife,[23] the false information does not conceal any civil invalidating or prohibiting impediment to a second marriage and does not affect the validity of the civil license. At most, the revelation of the previous marriage to the civil authority would have resulted in a demand for proof of its dissolution. The prospective bridegroom was able to furnish such proof. Consequently the priest may proceed to assist at the marriage without requiring a corrected or a new civil license.

Even if the civil license were invalid or if no civil license at all had been issued, the marriage would be valid according to the law of the Church. All that is required for the validity of a Catholic marriage is that diriment impediments either not affect the contracting parties [24] or at least be validly removed by dispensation [25] and that it be contracted before the pastor or local Ordinary or their delegate and at least two witnesses.[26]

Even in the civil common law there is no mention of the necessity of a marriage license. That matter is determined by the written statute law. Consequently, unless statute law rules otherwise, a marriage contracted without a license is civilly valid. In thirty-

[21] Cappello, *ibidem*, n. 74.

[22] Cf. Canons 470, § 1; 1238; 1813, § 1, 4°; 1816.

[23] Cf. Canon 1069, § 2.

[24] Canon 1036, § 2.

[25] Canon 1040.

[26] Canons 1094-1099.

four States of the United States a license is not required by statute law for the civil validity of a marriage. On the other hand, it is certain that for civil validity of a marriage a license is required by statute law in Arizona, Missouri, Nebraska, Tennessee, Virginia, West Virginia, Wisconsin and Alaska. Finally, there exists some doubt about the requirements of the statute law concerning this matter in the States of Arkansas, Connecticut, Illinois, North Dakota, Oregon, Utah and Vermont. In these and all the other States the civil license is required either by statute law or by jurisprudence for the lawfulness of marriage.[27] If such a law can be observed without conflict with a law of the Church, it must be observed in marriages between baptized persons. The civil law may justly impose a penalty on the contracting parties for failure to comply with such a valid and just civil law.[28]

However, civil statutes which require a civil license for the validity of the marriages of baptized persons are canonically unjust (as well as civilly invalid) because they are contrary to the law of the Church, which alone is competent to legislate and decree invalidating impediments and formalities for marriages between baptized persons.[29] Consequently, baptized contracting parties are not obliged in conscience to consider a civil license, as such, necessary for the validity of their marriage. In practice, however, the form which is to be used in order that a contracted marriage may be legally registered in the public records of the State is usually attached to the civil license.[30] As has been seen, the civil legislator is competent to decree such registration as necessary for legal proof of the contracted marriage and for the enjoyment of the "purely civil"—separable and temporary—effects of marriage (e. g., dower rights, rights of hereditary succession).[31] Such a law is just and valid because it is not contrary to the law of the Church and it is within the competence of the State. Its observance is therefore binding in conscience.[32] It follows, then, that in those States of the United States wherein statute law requires a civil license for

[27] Alford, *op. cit.*, nn. 286-287.

[28] Cappello, *ibidem*, n. 72.

[29] Canons 1016, 1038, § 2, 1094-1099.

[30] Alford, *op. cit.*, n. 413.

[31] Cappello, *ibidem*, n. 71.

[32] Cappello, *ibidem*, n. 74.

civil validity of marriage, baptized contracting parties would not be bound in conscience to procure a license as such. However, in all States of the United States they would be bound in conscience and in justice to obtain the civil license for lawfulness, and as a means of registering the fact of their contracted marriage. The only exception would be in the rare cases of a secret marriage of conscience,[33] a marriage when one or both parties are in danger of death,[34] and the extraordinary case provided for in Canon 1098, 1°. In the case under discussion, there seem to be no such extraordinary circumstances. Therefore a civil license is necessary in order to register in the public records of the State the fact of the contracted marriage. The license which was presented by the contracting parties may be used because the false statement does not invalidate the license in any State of the United States, neither as a license nor particularly as a means of legally registering the contracted marriage.

The second difficulty which is to be considered in the case under discussion is the possibility of the presence of the impediment of crime. In this matter the pastor or delegated priest should proceed in accordance with the Instruction of the Sacred Congregation of the Sacraments which was issued on June 29, 1941.[35] This Instruction determines the rules which are to be followed by the pastor in making the canonical inquiries before he permits the contracting parties to enter matrimony. In his inquiry he should, because of the doubt or suspicion that has arisen, diligently and accurately interrogate the parties, separately and prudently, concerning the possibility of the presence of the impediment of crime.[36] The date and other pertinent facts about the bridegroom's first marriage will be found recorded both in the parochial marriage registers[37] and in the baptismal registers.[38] The parochial record book of the de-

[33] Canons 1104-1107.

[34] Canons 1043, 1098, 1°.

[35] *Acta Apostolicae Sedis* [*AAS*], XXXIII (1941), 297; The Jurist, II (1942), No. 1 (January), *Supplement; The Ecclesiastical Review*, CV (1941), *Supplement.*

[36] S. C. de Sacramentis, instr. 29 iun. 1941, nn. 4 d, 5 a, Allegatum I, q. 9—*AAS*, XXXIII (1941), 297, 309; The Jurist, *loc. cit.; The Ecclesiastical Review, loc. cit.*

[37] Canons 1103, § 1; 470, § 1.

[38] Canons 1103, § 2; 470, § 2.

ceased members of the parish provides an authentic document of the death of the former spouse and of the dissolution of the marriage.[39]

If doubt about the presence of the impediment of crime continues, the pastor or delegated priest must request the parties to take a suppletory oath that they are entirely free from all impediments of Matrimony.[40] The priest may then lawfully assist at the marriage.[41]

If the impediment of crime is revealed, the priest must petition the local Ordinary for a dispensation from such diriment impediment.[42] If there is no time before the marriage to obtain the dispensation from the local Ordinary, or if there is danger that in communicating with him the secret or seal of confession will be violated, the pastor or the priest delegated *ad hoc* may dispense from the impediment if the case itself is occult.[43] The impediment of crime is usually an occult case, even though it could be proved in the external forum (e. g. from the birth of adulterine illegitimate children). In particular, the case which is under discussion seems from the circumstances to be completely occult, not only as involving an occult impediment but also an occult case in itself.

JOHN J. HENEGHAN

THE DECREE "TAMETSI" IN THE UNITED STATES

Julia Bonfante, a baptized Catholic, attempted marriage with a non-Catholic on July 5, 1902. His name is Stephen Delaware. He presents an affidavit that he was baptized from his brother and he swears himself that his mother told him he was baptized an Episcopalian. He has come to be friendly with me, and will sign the *cautiones*, though he says, I will be obliged to convert each of the five grown children separately. However, he will not renew the consent. He says he means no disrespect to me but that he feels the marriage before the Episcopalian minister was valid.

VICARIUS COOPERATOR

[39] Canons 470, § 1; 1238; 1813, § 1, 4°; 1816; 1069, § 2; S. C. de Sacramentis, instr. 29 iun. 1941, n. 6 a, Allegatum I, q. 2—*AAS*, XXXIII (1941), 297, 309; THE JURIST, *loc. cit.; The Ecclesiastical Review, loc. cit.*

[40] Canons 1829-1830; S. C. de Sacramentis, instr. 29 iun. 1941, Allegatum IV —*AAS*, XXXIII (1941), 316; THE JURIST, *loc. cit.; The Ecclesiastical Review, loc. cit.*

[41] Canon 1097, § 1, 1°.

[42] Canon 1040.

[43] Canons 1045, § 3; 199, §§ 1, 3, 4.

Canon 80: Dispensatio, seu legis in casu speciali relaxatio, concedi potest a conditore legis, ab eius successore vel Superiore, nec non ab illo cui iidem facultatem dispensandi concesserint.

Canon 81: A generalibus Ecclesiae legibus Ordinarii infra Romanum Pontificem dispensare nequeunt, ne in casu quidem peculiari, nisi haec potestas eisdem fuerit explicite vel implicite concessa, aut nisi difficilis sit recursus ad Sanctam Sedem et simul in mora sit periculum gravis damni, et de dispensatione agatur quae a Sede Apostolica concedi solet.

Canon 84, § 1: A lege ecclesiastica ne dispensetur sine iusta et rationabili causa, habita ratione gravitatis legis a qua dispensatur; alias dispensatio ab inferiore data illicita et invalida est.

§ 2: Dispensatio in dubio de sufficientia causae licite petitur et potest licite et valide concedi.

Canon 1040: Praeter Romanum Pontificem, nemo potest impedimenta iuris ecclesiastici sive impedientia sive dirimentia abrogare, aut illis derogare; item nec in eisdem dispensare, nisi iure communi vel speciali indulto a Sede Apostolica haec potestas concessa fuerit.

Canon 1057: Qui ex potestate a Sede Apostolica delegata dispensationem concedunt, in eadem expressam pontificii indulti mentionem faciant.

Canon 1060: Severissime Ecclesia ubique prohibet ne matrimonium ineatur inter duas personas baptizatas, quarum altera sit catholica, altera vero sectae haereticae seu schismaticae adscripta; quod si adsit perversionis periculum coniugis catholici et prolis, coniugium ipsa etiam lege divina vetatur.

Canon 1061, § 1: Ecclesia super impedimento mixtae religionis non dispensat, nisi:

1°. Urgeant iustae ac graves causae;

2°. Cautionem praestiterit coniux acatholicus de amovendo a coniuge catholico perversionis periculo, et uterque coniux de universa prole catholice tantum baptizanda et educanda;

3°. Moralis habeatur certitudo de cautionum implemento.

§ 2: Cautiones regulariter in scriptis exigantur.

Canon 1062: Coniux catholicus obligatione tenetur conversionem coniugis acatholici prudenter curandi.

Canon 1063, § 1: Etsi ab Ecclesia obtenta sit dispensatio super impedimento mixtae religionis, coniuges nequeunt, vel ante vel post matrimonium coram Ecclesia initum, adire quoque, sive per se sive per procuratorem, ministrum acatholicum uti sacris addictum, ad matrimonialem consensum praestandum vel renovandum.

§ 2: Si parochus certe noverit sponsos hanc legem violaturos esse vel iam violasse, eorum matrimonio ne assistat, nisi ex gravissimis causis, remoto scandalo et consulto prius Ordinario.

§ 3: Non improbatur tamen quod, lege civili iubente, coniuges se sistant etiam coram ministro acatholico, officialis civilis tantum munere fungente, idque ad actum civilem dumtaxat explendum, effectuum civilium gratia.

Canon 1064: Ordinarii aliique animarum pastores:

1°. Fideles a mixtis nuptiis, quantum possunt, absterreant;

2°. Si eas impedire non valeant, omni studio curent ne contra Dei et Ecclesiae leges contrahantur;

3°. Mixtis nuptiis celebratis sive in proprio sive in alieno territorio, sedulo invigilent ut coniuges promissiones factas fideliter impleant;

4°. Assistentes matrimonio servent praescriptum can. 1102.

Canon 1094: Ea tantum matrimonia valida sunt quae contrahuntur coram parocho, vel loci Ordinario, vel sacerdote ab alterutro delegato et duobus saltem testibus, secundum tamen regulas expressas in canonibus qui sequuntur, et salvis exceptionibus de quibus in can. 1098, 1099.

Canon 1095, § 1: Parochus et loci Ordinarius valide matrimonio assistunt:

1°. A die tantummodo adeptae canonicae possessionis beneficii ad normam can. 334, § 3, 1444, § 1, vel initi officii, nisi per sententiam fuerint excommunicati vel interdicti vel suspensi ab officio aut tales declarati;

2°. Intra fines dumtaxat sui territorii; in quo matrimoniis nedum suorum subditorum, sed etiam non subditorum valide assistunt;

3°. Dummodo neque vi neque metu gravi constricti requirant excipiantque contrahentium consensum.

§2: Parochus et loci Ordinarius qui matrimonio possunt valide assistere, possunt quoque alii sacerdoti licentiam dare ut intra fines sui territorii matrimonio valide assistat.

Canon 1096, § 1: Licentia assistendi matrimonio concessa ad normam can. 1095, § 2, dari expresse debet sacerdoti determinato ad matrimonium determinatum, exclusis quibuslibet delegationibus generalibus, nisi agatur de vicariis cooperatoribus pro paroecia cui addicti sunt; secus irrita est.

§ 2: Parochus vel loci Ordinarius licentiam ne concedat, nisi expletis omnibus quae ius constituit pro libertate status comprobanda.

Canon 1099, § 1: Ad statutam superius formam servandam tenentur:

1°. Omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi, licet sive hi sive illi ab eadem postea defecerint, quoties inter se matrimonium ineunt;

2°. Iidem, de quibus supra, si cum acatholicis sive baptizatis sive non baptizatis etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitatis cultus matrimonium contrahant;

3°. Orientales, si cum latinis contrahant hac forma adstrictis.

§ 2: Firmo autem praescripto § 1, 1°, acatholici sive baptizati sive non baptizati, si inter se contrahant, nullibi tenentur ad catholicam matrimonii formam servandam; item ab acatholicis nati, etsi in Ecclesia catholica baptizati, qui ab infantili aetate in haeresi vel schismate aut infidelitate vel sine ulla religione adoleverunt, quoties cum parte acatholica contraxerint.

Canon 1138, § 1: Matrimonii in radice sanatio est eiusdem convalidatio, secumferens, praeter dispensationem vel cessationem impedimenti, dispensationem a lege de renovando censensu, et retrotractionem, per fictionem juris, circa effectus canonicos, ad praeteritum.

§ 2: Convalidatio fit a momento concessionis gratiae; retrotractio vero intelligitur facta ad matrimonii initium, nisi aliud expresse caveatur.

§ 3: Dispensatio a lege de renovando consensu concedi etiam potest vel una tantum vel utraque parte inscia.

Canon 1141: Sanatio in radice concedi unice potest ab Apostolica Sede.

Canon 2375: Catholici qui matrimonium mixtum, etsi validum, sine Ecclesiae dispensatione inire ausi fuerint, ipso facto ab actibus legitimis ecclesiasticis et Sacramentalibus exclusi manent, donec ab Ordinario dispensationem obtinuerint.

The marriage of Julia Bonfante, a baptized Catholic, and Stephen Delaware, a non-Catholic, can be investigated under a two-fold aspect: the juridical form of marriage and the impediment of disparity of worship.

As regards the juridical form of marriage, the validity of their marriage is determined by the canon law which was in force at the time when they entered the contract, namely, July 5, 1902. At that time the Tridentine law on marriage was in effect. The Council of Trent, by its celebrated decree *Tametsi* on November 11, 1563, introduced into ecclesiastical law the substantial form of marriage. This decree continued in force until the decree *Ne temere,* which was enacted by the Sacred Congregation of the Council and took effect on April 19, 1908. The latter law has been repeated substantially in The Code of Canon Law which is effective as of May 19, 1918.

The *Tametsi* decree stated: " Those who attempt marriage in any other way than in the presence of the pastor or another priest delegated by the pastor or by the Ordinary and two or three witnesses, are hereby rendered incapable of contracting and the Holy Synod now renders such contracts null and void." A singular method was selected for the promulgation of this law. In order to avoid the multiplication of invalid marriages by heretics who would not observe this new juridical form for the celebration of marriage, the Council of Trent decreed that the *Tametsi* law was to be published in each individual parish at the discretion of the bishop and it was to take effect thirty days from the date of promulgation.[1] Thus, where it was seen that the majority of the inhabitants in a particular diocese were Catholic, the *Tametsi* decree was promulgated in

[1] Concilium Tridentinum, sess. XXIV, *de ref. matrim.*, c. 1; cf. Cappello, *Tractatus Canonico-Moralis de Sacramentis,* III, *De Matrimonio* (4. ed., Romae, 1939), n. 659.

the individual parishes. Where this condition did not exist, the decree was not published.[2] In the course of time many pontifical dispensations from the observance of the *Tametsi* decree, even in dioceses and parishes in which it had been promulgated, were granted in favor of marriages between two heretics or between a heretic and a Catholic. Perhaps the most important dispensation of this kind was that granted by Pope Benedict XIV on November 4, 1741. It was given in favor of the Netherlands and the Federated Provinces of Belgium and was later extended to many other regions, including various parts of the United States. It was known as the *Declaratio Benedictina.*

As regards the limited promulgation of the *Tametsi* decree in the United States, three categories of marriage law were in force.

First, in the Ecclesiastical Province of Santa Fe, with the exception of the northern part of the territory of Colorado, the *Tametsi* decree alone was in force. Consequently, all baptized persons were bound by the Tridentine juridical form of marriage. Thus, marriages between two Catholics, or two heretics or between a Catholic and a baptized non-Catholic were invalid unless they were celebrated in the presence of the pastor and two witnesses.

Secondly, in some sections of the United States the *Tametsi* decree applied only to marriages between two Catholics. Such marriages were invalid unless they were celebrated in the presence of the pastor and two witnesses. The law was personal and followed the Catholic contracting parties as long as they did not acquire a domicile or quasi-domicile in another parish in which the decree had not been promulgated. The law was also territorial and affected Catholic contracting parties who came from other parishes in which the decree had not been published. On the other hand, in these same sections the *Declaratio Benedictina* or Benedictine Privilege was in force. As a result of this privilege, marriages between two baptized non-Catholics, and those between a baptized non-Catholic and a Catholic were considered valid even though they had not been contracted in the presence of the pastor and two witnesses. The places in which both the *Tametsi* decree and the Benedictine Privilege were in force were: (1) the entire Province of New Orleans;

[2] Pallavicino, *Istoria del Concilio di Trento* (Napoli, 1853), lib. XXII, c. 8; cf. also Carberry, *The Juridical Form of Marriage*, The Catholic University of America Canon Law Studies, n. 84 (Washington, D. C., The Catholic University of America, 1934).

(2) the Province of San Francisco and the territory of Utah, with the exception of the southeastern part of Utah which lies to the east of the Colorado River; (3) the diocese of Vincennes (Indiana); (4) the city of St. Louis and the towns of St. Genevieve, St. Ferdinand and St. Charles, within the Archdiocese of St. Louis; (5) the towns of Kaskasia, Cahokia, French Village, Prairie du Rocher, East St. Louis, East Carondelet and Caseyville in the Diocese of Alton (now the Diocese of Belleville, Illinois).

Finally, in all other sections of the United States neither the *Tametsi* decree nor the Benedictine Privilege was in force. Consequently, all marriages between two Catholics, or two baptized non-Catholics, or between a Catholic and a baptized non-Catholic were considered as valid marriages even though they were not celebrated in the presence of the pastor and two witnesses.[3] However, the baptized who contracted marriage there in this manner acted unlawfully and were guilty of grave sin.[4]

As regards the unbaptized who contracted marriage, the Tridentine juridical form of marriage had no force of law. When two unbaptized persons contracted marriage before April 19, 1908, they were exempt from the *Tametsi* decree everywhere. Such marriages were, therefore, valid even though they were not contracted in the presence of the pastor and two witnesses, provided that they were not bound by impediments of the divine natural or positive law.[5] Likewise in the period prior to the *Ne temere* decree, according to a principle that was quite commonly admitted, those who were exempt from ecclesiastical marriage laws communicated the exemption to those contracting parties who were not exempt—" propter individuitatem contractus."[6] Thus, when a dispensation from the impediment of disparity of worship was obtained, there was also extended

[3] *Acta et Decreta Concilii Plenarii Baltimorensis III* (1884), (Baltimorae, 1886), pp. CV–CIX; Sabetti-Barrett, *Compendium Theologiae Moralis* (21. ed., Neo-Eboraci, 1919), n. 903; Ayrinhac-Lydon, *Marriage Legislation in the New Code of Canon Law* (New, revised ed., New York, 1936), pp. 236–238.

[4] De Becker, *De Sponsalibus et Matrimonio* (2. ed., Lovanii, 1903), p. 135.

[5] Wernz, *Ius Decretalium*, IV, *Ius Matrimoniale Ecclesiae Catholicae* (Romae, 1904), n. 168.

[6] Schenk, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, The Catholic University of America Canon Law Studies, n. 51 (Washington, D. C., The Catholic University of America, 1929), n. 96, note 34; De Smet, *De Sponsalibus et Matrimonio* (Brugis, 1909), p. 93.

to the unbaptized person, unless the Holy See determined otherwise, the favor of communicating to the Catholic party exemption from the Tridentine juridical form of marriage, in a place where it had been promulgated.[7] With such a dispensation, but without the assistance of the pastor and two witnesses, a Catholic or a baptized non-Catholic could contract marriage validly with an unbaptized person, whether or not the *Tametsi* decree had been promulgated in the place concerned. However, despite such communication of exemption and even if the *Tametsi* decree had not been published in the place concerned, such a marriage to an unbaptized person—without the assistance of the pastor and two witnesses—was absolutely unlawful and gravely sinful for either a Catholic or a baptized non-Catholic.[8] Of course, if a dispensation from the impediment of disparity of worship had not been obtained, marriage between an unbaptized person and either a Catholic or a baptized non-Catholic was invalid.[9]

The principle of communication of exemption was abolished by the *Ne temere* decree which took effect on April 19, 1908. By the terms of this decree all Catholics of the Latin rite, when marrying among themselves or with a Catholic of the Oriental rite, were bound to contract marriage before two witnesses and either the parish priest or the Ordinary of the place wherein the marriage took place, or a priest delegated by one or the other. Catholics would likewise be so bound when marrying a non-Catholic, whether baptized or not, even after obtaining a dispensation from the impediment of mixed religion or disparity of worship—except in those regions for which the Holy See had provided otherwise.[10]

Considered in the light of these principles of canon law which were in force at the time of the contract, the status of the marriage

[7] Wernz, *op. cit.*, IV, n 168; De Smet, *loc cit.*

[8] De Becker, *op. cit.*, p. 135; Gasparri, *Tractatus Canonicus de Matrimonio* (3. ed., Parisiis, 1904), n. 710. Gasparri, however, states that such communication of exemption was merely theoretical because in the dispensation from the impediment of disparity of worship there was always expressed the condition that the marriage be celebrated in the presence of the pastor and two witnesses—" in facie Ecclesiae debita forma."

[9] Gasparri, *op. cit.*, nn. 685-712; Wernz, *op. cit.*, IV, nn. 501-513; Schenk, *op. cit.*, nn. 70-77.

[10] S.C.C., decr. "*Ne temere*", 2 aug. 1907, art. XI, § 2—*Fontes*, n. 4340; *Acta Sanctae Sedis*, XL (1907), 527; *Analecta Ecclesiastica*, XV (1907), 320; De Smet, *op. cit.*, pp. 531-534; Schenk, *op. cit.*, n. 112, note 83.

of Stephen Delaware and Julia Bonfante is subject to several possible solutions. If Stephen Delaware, the non-Catholic, was baptized, and if his marriage to Julia Bonfante, the Catholic party, in the year 1902, was contracted in a place in which the *Tametsi* decree alone had been promulgated, the marriage was invalid because it was not celebrated in the presence of the parish priest and two witnesses. Convalidation of the marriage in accordance with the principles of canon 1137 and canons 1094-1099, or a " sanatio in radice " according to the principles of canons 1138-1141 would be necessary. If in the same place the Benedictine Privilege had been extended, or if the *Tametsi* decree had not been promulgated in the place concerned, the marriage before the Episcopalian minister was valid and continues so. However, in all three cases, the marriage, without the assistance of the parish priest and two witnesses, and without a dispensation from the impediment of mixed religion, was unlawful and gravely sinful for both parties, as baptized persons.

If Stephen Delaware, the non-Catholic, was unbaptized, a dispensation from the impediment of disparity of worship had to be obtained from the Holy See for the validity of the marriage. If the dispensation was obtained and if it included the condition that the marriage be contracted *in facie Ecclesiae debita forma,* the marriage was invalid because it was not celebrated in the presence of the parish priest and two witnesses. If the dispensation was not obtained at all, the marriage was invalid. In either case, the marriage must be convalidated or a " sanatio in radice " must be obtained from the Holy See. Since Stephen Delaware refuses to renew the consent, the latter alternative is the only remedy available. If, however, the dispensation from the impediment of disparity of worship had been obtained and if it contained no condition that the marriage be celebrated in the Church, the marriage was validly contracted because Stephen Delaware, as unbaptized, was exempt from the Tridentine juridical form of marriage, even in places where the *Tametsi* decree had been promulgated, and he communicated this exemption to Julia Bonfante, the Catholic party.

To resolve the doubt concerning the baptism of Stephen Delaware, recourse must be made to a principle which was commonly adopted and applied in such cases by the Roman Congregations before the promulgation of The Code of Canon Law. This principle stated: *Censendum est validum baptisma dubium in ordine ad validitatem matrimonii.* Accordingly, a marriage between a person who was

certainly baptized, whether Catholic or non-Catholic, and a doubtfully baptized non-Catholic was considered valid. This was a *praesumptio iuris* and it ceded only to certain proof of the non-baptism of the non-Catholic.[11] That Stephen Delaware was either certainly or at least doubtfully baptized in the Episcopalian sect is attested to by the sworn affidavits of Stephen and his brother. Consequently, according to the pre-Code principle, the baptism of Stephen must be presumed valid until proved otherwise. It follows, then, that his marriage must be presumed to have been a marriage of mixed religion and not one of disparity of worship. Therefore, unless the *Tametsi* decree alone was promulgated in that place, the marriage of Stephen Delaware and Julia Bonfante was valid and there is no need of either a convalidation of the marriage through the renewal of the consent or of a "sanatio in radice." There remains for Julia Bonfante, however, the obligation to receive worthily the Sacraments of Penance and the Holy Eucharist, and to apply for the omitted dispensation from the impediment of mixed religion as required by Canon 2375. If a sanation were needed, the Ordinary's quinquennial faculties would render him competent to grant it.[12]

JOHN J. HENEGHAN

"EPISCOPUS PROPRIUS"

Bartholomew Timmons, a seminarian in the diocesan seminary, is a relative of one of my parishioners. He came from Ireland three years ago and entered the seminary here, expecting to be adopted by this diocese. However, as there was a sufficient number of candidates for this diocese, he was obliged to seek a bishop elsewhere. He was finally adopted by a diocese on the West Coast.

Now he is ready to be ordained to minor orders, and to receive tonsure of course. The bishop of his origin is unwilling to issue dimissorials, as that would place him under obligation to accept the young man as a priest of his diocese. The bishop of the diocese on the West Coast says that he is incompetent to issue such dimissorials. I have suggested that perhaps you would be willing to issue the dimissorials and then after the young man is ordained to excardinate him.

PAROCHUS

Canon 955, § 1: Unusquisque a proprio Episcopo ordinetur aut cum legitimis eiusdem litteris dimissoriis.

[11] Gasparri, *op. cit.*, nn. 688-689; Ayrinhac-Lydon, *op. cit.*, n. 131.

[12] Cf. THE JURIST, III (1943), 150, 151.

Canon 956: Episcopus proprius, quod attinet ad ordinationem saecularium, est tantum Episcopus dioecesis in qua promovendus habeat domicilium una cum origine aut simplex domicilium sine origine; sed in hoc altero casu promovendus debet animum in dioecesi perpetuo manendi iureiurando firmare, nisi agatur de promovendo ad ordines clerico qui dioecesi per primam tonsuram iam incardinatus est, vel de promovendo alumno, qui servitio alius dioecesis destinatur ad normam can. 969, § 2, vel de promovendo religioso professo, de quo in can. 964, 4°.

Canon 969, § 2: Non prohibetur tamen Episcopus proprium promovere subditum, qui in futurum, praevia legitima excardinatione et incardinatione, servitio alius dioecesis destinetur.

Canon 981, § 1: Si ne unus quidem ex titulis de quibus in can. 979, § 1, praesto sit, suppleri potest titulo servitii dioecesis, et, in locis Sacrae Congregationi de Prop. Fide subiectis, titulo missionis, ita tamen ut ordinatus, iureiurando interposito, se devoveat perpetuo dioecesis aut missionis servitio, sub Ordinarii loci pro tempore auctoritate.

Canon 2373, 1°: In suspensionem per annum ab ordinum collatione Sedi Apostolicae reservatam ipso facto incurrunt: Qui contra praescriptum can. 955, alienum subditum sine Ordinarii proprii litteris dimissoriis ordinaverint.

As the case is presented, it seems that Bartholomew Timmons retains either a necessary domicile because he still is a minor or a voluntary domicile in the diocese of his origin. This seems to follow from the fact that the bishop of the diocese of his origin did not say that he lacked competency to issue dimissorial letters but rather chose not to issue the dismissorial letters because he did not wish the candidate to become incardinated in his diocese by the reception of tonsure.[1]

Several alternative solutions are possible. Although the bishop of the diocese of origin of the candidate does not wish him to become incardinated absolutely in his diocese, he may very readily agree to issue the dimissorial letters for the reception of tonsure and concomitant incardination in the diocese with the written stipulation, in accordance with the provisions of canon 969, § 2, that later the new cleric will be properly excardinated from his diocese of origin and become incardinated in the diocese on the West Coast.[2] Similarly, the bishop of the diocese of origin of the candidate may very readily enter into a written agreement with the bishop of the diocese on the West Coast that the candidate will be promoted to tonsure for the service of the latter diocese. The bishop of the diocese

[1] Canon 111, § 2.

[2] Cf. canon 112.

of origin would then issue dimissorial letters so that the bishop of the diocese in which the seminary is located may lawfully, in accordance with the provisions of canon 955, § 1, promote the candidate to tonsure for the service of the western diocese. The new cleric thus becomes *ipso facto* incardinated in the western diocese, even though he has not yet acquired a domicile in that diocese. This is clear from the principle stated in canon 111, § 2 and from several responses by the Pontifical Commission for the Interpretation of the Code of Canon Law.[3] Since the candidate thus does not become incardinated in his diocese of origin, there is no need or possibility of excardination from that diocese and incardination in the western diocese by means of letters of excardination and incardination in the manner prescribed by canon 112.

In the event that neither of these methods is chosen, there remain three additional procedures, either of which will be effective. The candidate, when he reaches his majority, may proceed to the western diocese for which he has been adopted and may there establish his own voluntary diocesan domicile *sine origine*. He may acquire this diocesan domicile by residing there for at least one day with the intention of remaining there permanently unless called away.[4] Then, in accordance with the prescriptions of canon 956, the candidate must confirm by oath his intention of remaining permanently in the diocese, with the result that the bishop of the West Coast diocese becomes his proper Ordinary for lawful ordination. Accordingly, the candidate may receive tonsure lawfully from his newly acquired proper bishop or, with the proper dimissorial letters issued by his proper bishop, from the bishop of the diocese in which the seminary is located or any other bishop in communion with the Apostolic See.[5] Unless the candidate acquires such a diocesan domicile and has taken the required oath of intention to remain there perpetually, the bishop of the western diocese would not become the proper bishop for ordination of the candidate[6] and

[3] Aug. 17, 1919 (Private)—Bouscaren, *Canon Law Digest* (Milwaukee, 1934-1941), I, 89; Feb. 17, 1930—*Acta Apostolicae Sedis* [*AAS*], XXII (1930), 195; Bouscaren, *op. cit.*, I, 91; Dec. 7, 1931 (Private) — Bouscaren, *op cit.*, II, 25; July 24, 1939—*AAS*, XXXI (1939), 321; Bouscaren, *op. cit.*, Supplement, 42. Cf. also Beste, *Introductio in Codicem* (Collegeville, 1938), pp. 168-169.

[4] Canon 92.

[5] Canons 955, § 1; 958, § 1, 1°; 961.

[6] Canon 956.

could not lawfully issue dimissorial letters for his ordination [7] or lawfully [8] (though validly [9]) promote him to tonsure without the proper dimissorial letters. However, it is usually a serious inconvenience for a seminarian to arrange to establish a domicile in a distant diocese. Therefore, the fourth or fifth procedure would be less difficult and more practical, especially since the bishop of the western diocese is not unwilling but only lacking in the necessary competency to issue dimissorial letters.

Fourthly, the candidate, when he reaches his majority, may acquire a domicile *sine origine* in the diocese in which the seminary is located by residence there for at least one day with the intention of remaining there permanently unless called away.[10] Thus, in accordance with the principles of canon 956, the bishop of the diocese of the seminary becomes the proper bishop for the ordination of Bartholomew Timmons. He may promote him to tonsure in either of two ways. He may do so with the result that he becomes incardinated in the diocese of the seminary but with the written stipulation that later the new cleric will be properly [11] excardinated from that diocese and become incardinated in the western diocese.[12] In that case there is no necessity for the candidate to confirm by an oath his intention to remain permanently in the diocese of the seminary.[13] This oath will be given later when the candidate becomes incardinated in the western diocese.[14] The alternative fifth method would seem to be more practical. In following this procedure, the bishop of the diocese of the seminary and of the domicile of the candidate will enter into a written agreement with the bishop of the western diocese in consequence of which the former

[7] Canons 955, § 1; 956; 958, § 1, 1°.

[8] Canons 955, § 1; 956.

[9] Canon 951; cf. also a response issued by the Sacred Congregation of the Council issued on March 10, 1923—*AAS*, XVI (1924), 51; Bouscaren, *op. cit.*, I, 89-91.

[10] Canon 92.

[11] Canon 112.

[12] Canon 969, § 2.

[13] Canon 956.

[14] Cf. Vermeersch, *Periodica de Re Morali, Canonica, Liturgica* (Brugis-Romae, 1905—), XII, 74; *The Ecclesiastical Review* (Philadelphia, 1889—), LXVIII (1923), 305 ff., LXXXVI (1932), 77 ff.

bishop will promote the candidate to tonsure for the service of the latter diocese. The new cleric thus concomitantly becomes incardinated in the western diocese,[15] without any necessity for recourse to the procedure specified in canon 112. Although, according to canon 956, there is no necessity for the candidate to take an oath to remain permanently in the diocese of the seminary, there seems to be an obligation for him to take an oath to remain permanently in the western diocese.[16]

The principles set forth in the five procedures which have been outlined above must be followed for the lawfulness of the promotion of the candidate to tonsure. Any contravention of these canonical principles would not affect the validity of the ordination but would incur the penalty which is provided in canon 2373, 1°.

If the candidate is promoted to tonsure in the first manner with dimissorial letters from the bishop of the diocese of his origin and domicile, he is incardinated in that diocese and all subsequent ordinations, or dimissorial letters for them, must come from that bishop until he is incardinated in the western diocese. Similarly, if he is promoted to tonsure in the fourth manner outlined above, all subsequent ordinations, or dimissorial letters for them, must come from the bishop of the diocese of the seminary and of his domicile until he is incardinated in the western diocese. Finally, if the candidate, in accordance with the principles outlined above in the second, third and fifth methods, is promoted to tonsure for the service of the western diocese, he is incardinated in that diocese and all subsequent ordinations, or dimissorial letters for them, must come from the bishop of that diocese.[17]

The canonical title for the ordination of Bartholomew Timmons will be the title of "service of the diocese."[18]

JOHN J. HENEGHAN

[15] Canon 111, § 2.

[16] Beste, *op. cit.*, p. 169.

[17] Pontifical Commission for the Interpretation of the Code of Canon Law, Dec. 7, 1931 (Private)—Bouscaren, *op. cit.*, II, 25; July 24, 1939—*AAS*, XXXI (1939), 321; Bouscaren, *op. cit.*, Supplement, 42.

[18] Canons 979; 981, § 1.

Decrees and Decisions

CANONICAL

Acts of the Roman Curia

In the October issue of *Acta Apostolicae Sedis,* there is noted a reply of the Sacred Congregation of the Council, stating that a canon who misses choir in the discharge of the duties of synodal judge is entitled under Canon 420, § 1, 14°, to the daily distributions even though he may receive a stipend for his work as judge. Reference is made to a reply of the Pontifical Commission of November 24, 1920 (*Acta Apostolicae Sedis,* XII [1920], 573) holding that a canon who received a stipend for lectures in seminaries was included among those entitled to the income of the prebend under Canon 421, § 1, 1°. It is now stated that this reply must be understood in the sense of the present decision and that the professor is entitled also to the daily distributions, for an analogy is drawn between the two cases. The decision is dated as given February 14, 1942, and approved February 23.

In the same issue a decree from the Sacred Penitentiary adverts to the circulation of crucifixes blessed by some Prelate with a plenary indulgence to be gained by the sick as often as they kiss it. Correcting this false impression, the decree refers to two other decrees, one of the Holy Office, June 10, 1914 (*Acta Apostolicae Sedis,* VI, [1914], 347), the other of the Sacred Penitentiary, June 23, 1929 (*Acta Apostolicae Sedis,* XXI, [1929], 510). The decree explains that according to these two declarations these crucifixes are so blessed that the plenary indulgence is gained only *in articulo mortis.* Decree dated September 22, 1942.

* * * *

The Sacred Congregation of Seminaries and Universities has announced that the prohibition forbidding clerics to enroll for advanced studies in secular universities without permission of the Sacred Congregation is effective for the present only in Italy.

On January 4, a decree of the Sacred Congregation of Rites formally recognized the heroism of the virtues of Kateri Tekakwitha.

* * * *

In his Christmas message to the world, Pope Pius XII emphasized five additional principles as the necessary basis for a constructive and lasting peace: the dignity of the human person; the defense of the family principle; the dignity of labor; the rehabilitation of the juridic order; the Christian concept of the State.

* * * *

The provisions of the Motu proprio of December 1, 1940, permitting the anticipation of Midnight Mass in the afternoon of Christmas Eve was continued in force last Christmas for territories subject to blackout regulations. It was necessary that an interval should elapse between the end of Mass and the moment when the blackout rules would go into effect. The faithful by attending that Mass fulfilled the Christmas obligation; they were permitted to communicate even though they had communicated in the morning. Priests celebrating a Mass at the given hour were permitted to celebrate only two Masses on Christmas.

* * * *

The custom of infant Confirmation has been discontinued throughout the Archdiocese of Santa Fe in conformity with the desires of the Holy See, as stated in a pastoral of Most Rev. Rudolph A. Gerken, D.D.

Most Rev. Robert E. Lucey, D.D., has also announced that the custom will be discontinued as of January 1 in the Archdiocese of San Antonio and in the Dioceses of Galveston and Dallas. It has already been discontinued in the Archdiocese of Denver and its suffragan Sees and in the Diocese of Oklahoma City-Tulsa.

* * * *

In his visit to the chaplains in North Africa Most Rev. Francis J. Spellman, D.D., Military Vicar, distributed antimensiums, for the use of which by chaplains on foreign service an indult has been granted by our Holy Father through the Sacred Congregation for the Oriental Church.

* * * *

Catholic chaplains of the Canadian Navy, Army and Air Force have received faculties for the celebration of Mass in the afternoon but before seven o'clock. Communion may be received at the same hour but only during Mass by soldiers who have taken no liquid for an hour, no food for four hours, and no alcoholics from the preceding midnight.

Most Rev. John T. Kidd, D.D., Bishop of London, Province of Ontario, has imposed two months' notice of intention to marry when both parties are Catholic; three months, when one is not a Catholic.

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Most Rev. Charles F. Buddy, D.D., Bishop of San Diego, held the first synod of the Diocese on February 28, to which he invited chaplains serving at posts within the Diocese.

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The Diocese of Syracuse has celebrated its twelfth Synod.

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SECULAR

Freedom of Religion in the Courts

Jehovah's Witnesses plan an appeal to the Supreme Court of the United States against a Mississippi Supreme Court decision making it unlawful in war time to advocate " doctrines and teachings detrimental to the public safety " and " to encourage . . . disloyalty to the government or to create an attitude of refusal to salute the flag ". A similar bill introduced into the House of Representatives of Arkansas provides fines and imprisonment for persons advocating or distributing literature designed to encourage violence, sabotage, or disloyalty to the government of the United States, prohibits any action that would incite racial distrust, disorder, prejudice, or hatred, and makes it a felony to pass out literature which reasonably tends to create an attitude of stubborn refusal to salute, honor, or respect the flag. But the Supreme Court of Washington has held that school children can not be forced to salute the flag or repeat the oath of allegiance when the objection is based on religious beliefs. Lower court decisions of West Virginia and North Carolina have held the same. This in spite of the decision of the Supreme Court of the United States (cf. The Jurist, I [1941], 32-39), holding that it pertains to State legislatures to determine what means are desirable for the promotion of national cohesion and loyalty, notwithstanding the fact that those means may conflict with religious conviction. The latter decision will likely be reconsidered, since Justices Black, Murphy and Douglas are said to have changed their view on this point. Chief Justice Stone was the only Justice dissenting. Briefs have been filed in the interest of review by the Bill of Rights Committee of the American Bar Association and by the American Civil Liberties Union.

Two decisions of the Supreme Court of the United States rendered on March 8th seem to conflict in a degree with the decision rendered on June 8th last year concerning the propaganda activities of Jehovah's Witnesses. The recent decisions touched ordinances of two Texas towns, one forbidding the distribution of handbills involving religious tenets and the other the distribution of books for a consideration. The June 8th decision upheld the right of town governments to exact a license fee for peddlers, against which Jehovah's Witnesses had offended by peddling tracts and phonograph records without paying the fee (cf. THE JURIST, II [1942], 312). The March 8th decisions are in harmony with the 1940 decision in *Cantwell v. State of Connecticut* (309 U. S. 626—cf. THE JURIST, I [1941], 362), in which the Supreme Court of the United States overruled the Supreme Court of Connecticut as to a statute which required solicitors for a religious cause to obtain the approval of the Secretary of Public Welfare. It was Jehovah's Witnesses that were involved in the latter case also. A statute of New Hampshire upheld by the Supreme Court in 1941, seems contrary, however, to the spirit of these decisions. The case was *Cox et al. v. State of New Hampshire* (61 S. Ct. 762—cf. THE JURIST, I [1941], 364), and upheld the requirement that a license for processions be obtained from licensing committees or town selectmen. So does the decision of the Supreme Court of Massachusetts, which has upheld the conviction of Jehovah's Witnesses for the violation of an ordinance forbidding children under age to sell magazines on the street. But the Supreme Court of New York, which has reversed a lower court decision supporting an ordinance requiring the payment of a license fee for the peddling of religious tracts, seems to be in harmony with them.

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On February 1, the Supreme Court of the United States ruled that two doctors, whose lives were not endangered by anti-contraceptive legislation, were not entitled to sue to have it set aside, though they alleged that the lives of certain of their patients were placed in jeopardy by such laws, which they argued thus contravened the provisions of the Fourteenth Amendment.

Pending Legislation

IN CONGRESS

A resolution of Senator Arthur H. Vanderburg of Michigan is in effect a new Child Labor Amendment. The previous Amendment was passed by Congress in 1924 but has not yet been ratified by a sufficient number of States. The new resolution reads as follows, with the pertinent provisions of the previous act inserted in parenthesis: " Congress shall have the power to limit (previous law inserted ' regulate ' here) and prohibit the (previous law read ' labor ') employment for hire of persons under 16 (previous law read ' 18 ') years of age."

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Senator Clapper of Kansas has introduced a Constitutional Amendment which would empower Congress to enact uniform divorce, marriage, and legitimation laws.

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A bill has been introduced in the House of Representatives to prevent discrimination in the awarding of federal government positions or of positions with firms holding government contracts because of religion, politics or labor affiliation. A bill is pending in the Senate prohibiting discrimination because of color, race, or creed in places of public accommodation, or entertainment in Washington.

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A bill introduced in the Senate and pending before the Senate Finance Committee proposes to extend the benefits of the Social Security Act to approximately a million employes of religious, charitable and educational institutions, with the exception of the clergy and religious attached thereto, and provides that no change in tax-exempt status shall result.

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A bill has been introduced into the Senate providing that unsolicited merchandise is unmailable but exempting religious, charitable, and eleemosynary societies or institutions upon approval by the Postmaster General and only if they are sole beneficiaries of proceeds of sale.

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A bill has been introduced into the House of Representatives exempting from admission tax the attendance at entertainments for the benefit of religious, charitable, or educational organizations.

IN NEW YORK

A bill making Good Friday a legal holiday has been introduced into the Legislature.

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The New York State Council of Churches is opposing bills to waive pre-marital health examinations; to relax the age requirement for marriage in that State, now twenty-one for men; and to legalize bingo conducted under the auspices of religious, charitable, and fraternal organizations.

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IN PENNSYLVANIA

Bills have been introduced into the Senate to legalize bingo games held under the auspices of churches, fire companies, and social and fraternal orders; and to require a year to elapse between divorce and re-marriage.

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IN NORTH CAROLINA

A bill to relieve partnerships, firms and corporations from income tax on contributions to religious and charitable institutions has been introduced into the Legislature.

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A bill has been introduced to tax rental property owned by religious, charitable, and educational institutions, even though the income is devoted to the purposes of the institution.

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A bill has been introduced to prohibit the sale of wine from Saturday midnight till 8:00 A.M., Monday morning.

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A bill has been introduced providing for a State referendum on prohibition of liquor.

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IN INDIANA

A bill has been introduced providing for the prohibition of liquor.

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A bill has passed the House of Representatives providing that school officials, on request of parents, may release a child for a total

period not to exceed two hours a week for religious instruction, without loss of credit.

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A bill has been introduced into the Senate that would exempt from taxation for another two years property owned by religious, educational and fraternal organizations that is rented or used for profit.

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The proposal to provide free textbooks to pupils of parochial schools seems to have been sidetracked for the present session.

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IN OREGON

An amendatory bill touching the Workmen's Compensation Act of Oregon now pending in the Legislature would authorize Christian Science instead of medical treatment. Seventh Day Adventists are opposing a bill that would introduce Saturday classes in public schools as " religious legislation ". A bill to remove church property from the tax exemption list seems destined to defeat.

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IN NEW HAMPSHIRE

A bill has been introduced into the House of Representatives reading as follows: " No books shall be introduced into the public schools, calculated to favor any particular religious sect or political party, advocating, directly or by inference, a change in our present form of government or way of life."

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A bill has been introduced into the Legislature permitting the exemption of children from class for sixty minutes a week to be devoted to religious instruction.

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The State Senate has passed a bill legalizing Sunday afternoon " movies ".

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IN MISSOURI

Clergymen of all faiths are resisting a measure introduced into the Legislature that would permit notaries to perform marriage ceremonies.

IN KANSAS

A bill has been introduced into the House of Representatives defining beverages as intoxicating if they contain the slightest fraction of even one per cent of alcohol.

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IN ARKANSAS

The Committee on Cities and Towns of the Senate has rejected a bill against horse racing and parimutuel betting.

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IN SOUTH CAROLINA

A bill has been introduced into the House of Representatives requiring health certificates and a lapse of three days from application for the granting of marriage licenses.

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JUVENILE COURT IN PENNSYLVANIA

A recent study of the Public Charities Association of Pennsylvania made a report on the Juvenile Court set-up in that State. It says that Juvenile Court proceedings are held in most counties as a Juvenile Court session of a municipal court (called Court of Quarter Sessions). The only separate Juvenile Court in the State is that of Allegheny County, of which Pittsburgh is the county seat. In all other counties, the judges sit by virtue of the appointment made by the president judge of the court. The change in the personnel thus occasioned is regarded as undesirable.

A child appearing in Juvenile Court is not held a criminal; there is no indictment and no jury trial. The judge may discharge the delinquent, release him on probation, send him to an institution, or place him in a foster home. Other powers of the judge are to release him on parole after institutional treatment; to discharge him from the care of the Court or from the custody of the institution; to fine the parents.

Jurisdiction extends over persons under sixteen years of age needing the special protection of the State; additional jurisdiction in special cases is given for persons between the ages of sixteen and eighteen; there is no competence where murder is involved. In the case of other crimes, cases of delinquents brought to criminal court

are transferred to the Juvenile Court; even when the person is between the age of sixteen and eighteen if the trial judge decides it so. The judge orders detention in the proper home or release in custody, pending hearing. If the case is a penitentiary offense and the delinquent is over fourteen years of age, the Juvenile Court judge may remand the case to the criminal court.

The Juvenile Court's jurisdiction continues till the person has reached the age of twenty-one.

The Court has jurisdiction also over adults contributing to the delinquency of a minor, though the adult may always demand a jury trial.

The Court has authority to appoint probation officers whose salaries are determined by the judges and the county commissioners.

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Regulations for the marriage of United States soldiers serving in the United Kingdom have been issued from the headquarters of the United States Army in the European theater. They must have permission from their superiors, having filed a written application two months prior to the contemplated date. The superior must warn the soldiers that he is entitled to no special living arrangements; that his wife may not be permitted to accompany him on a change in station or on return to the United States; that she will not be entitled to privileges provided for dependents in the United States, though she will be given the monetary allowance and insurance provided for wives of soldiers; and that she is not automatically naturalized, though exempt from quota regulations.

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The National Catholic Welfare Conference received an unfavorable reply from Paul V. McNutt, War Man Power Commissioner, to its request that religious enterprises be placed on the Commission's list of essential activities. Now the Federal Council of Churches is about to confer with him on the same matter.

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The National War Service Act exempts ordained clergymen and students of recognized theological or divinity schools from training and service under its terms, but it makes no provision for the exemption of those who might oppose war work through religious convictions.

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Director of the Selective Service Lewis B. Hershey has equivalently authorized the deferment of full-time pre-theological students of recognized schools who will have completed their preparatory course before July 1, 1945.

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67,483 clergymen and theological students of all denominations were registered under Selective Service as of September 1. All were deferred. 1,331 are in Washington, D. C.

On December 18, the Kentucky Court of Appeals ruled that free transportation of parochial and private school pupils by public school agencies is unconstitutional.

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The Attorney General of North Carolina has ruled that church property is not exempt from taxation unless it is on the land where the church stands or is actually used for religious purposes.

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The Franciscan Fathers, owning the building in the Chicago Loop in which the film "Ecstasy" was being shown, compelled its withdrawal as a violation of the terms of the lease held by the theater owner.

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The Supreme Court of Wyoming has recently held common law marriage invalid.

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The Supreme Court of South Carolina has upheld local ordinances forbidding the sale of wine and beer on Sundays. The Supreme Court of Tennessee has ruled that the sale of beer on Sunday as a business is illegal.

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The City of Louisville has placed income-producing property of religious, charitable, and educational institutions on the tax rolls.

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A member of Jehovah's Witnesses who refused to serve on a Superior Court jury in North Carolina was sentenced for contempt of court.

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Catholics have appealed to the Mexican authorities, including the Board of Civilian Defense, asking for chaplains in the Mexican army.

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The Supreme Court of Mexico has reversed a fifteen-year old decision of a lower court that nationalized a Catholic school of the Jesuits in Puebla on the appeal of a group of alumni, five of whom are now attorneys.

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By presidential proclamation, the Feast of the Immaculate Conception is to be observed annually throughout Haiti as a national holiday.

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The Superior Court of the Province of Quebec has held educational property used by the Redemptorist Fathers for a scholasticate as freed from a special school tax for the Protestant school of the locality, though it had been previously subject prior to purchase by the religious. The property was free of the municipal tax primarily and consequently of the special tax as well.

The 53-year old Manitoba school question was revived recently when the Winnipeg school board asked the provincial government to modify the law which permits twenty-five parents to obtain a half-hour religious instruction in public schools. The modification would entrust the decision entirely to the discretion of the school trustees. After Manitoba became a province, Protestants came to enjoy a majority and in 1890 made Protestant schools the public schools of the province. Catholic and private schools were taxed. The Supreme Court ruled this act invalid in virtue of guarantees given when Manitoba became a province. The Privy Council upheld the intention of the act containing this guarantee but to clarify obscurities, the Governor General in Council ruled that a supplementary act should be passed to restore to the Catholic minority the rights of which it had been deprived. The Manitoba government refused to do so. The public schools are definitely Protestant; interpretation of religious points are made by Protestant teachers. A textbook in use states: "There is nothing in the Bible to support the Catholic belief in transsubstantiation..."

Reviews

LES TENDANCES EUGENISTES AU CANADA. By Hervé Blais, O.F.M., S.T.D., L'institut Familial, Montreal, 1942. Pp. xx, 199.

This book consists of a review of the general notions of eugenics, an account of pertinent Canadian laws with a subsequent critique, and a statement of the Catholic thought on eugenics. The first part of this book is better estimated by a medical specialist, but the second and third parts are within the province of law and theology and can, therefore, be reviewed here.

Dr. Blais gives an adequate account of the Canadian laws which legislate on eugenics. He mentions in which States a medical certificate is required before marriage and in which States an affidavit of good health is sufficient. Here, too, there is a statement of laws which consider sterilization. Dr. Blais examines all these various statutes and discusses them from the standpoint of morals. This examination is not a bare treatise on moral considerations without considering possible medical advantages. There is a serious attempt to investigate what medical advantages may be derived from eugenic practices. Several medical authorities are adduced, and these opinions are kept in mind whenever these practices are discussed on moral grounds.

The critique of the laws on eugenics proceeds according to the Catholic doctrine on the rights of the individual to marriage with a careful and detailed statement of the power of the State to control marriage. There is no deviation from the doctrine of the Church, nor is there any desire to deny the State what control it may possess. Dr. Blais thoroughly understands that questions of health and family security are not exclusively matters of theology. It must not be thought, however, that the author of this book is surrendering the rights of the Church. It must rather be maintained that the author is trying to see where the rights of both Church and State may be dovetailed so that the individual rights of the faithful and of the citizens may be clearly and unmistakably set forth.

The third part of this book is devoted to an explanation of the Papal Encyclical *Casti connubii.* In this section is also found an explanation of the decrees of the Holy Office regarding eugenics and sterilization.

The appendix of Dr. Blais' work is useful. It contains the text of the laws of the various States in Canada which legislate on the solemnization of marriage and on the required affidavit of good health. Likewise are found the texts of the laws which deal with sterilization. These texts will be handy for possible investigation when the entire Code of Laws is unavailable. It is to be hoped that Dr. Blais has set a good example for other authors to follow. How annoying it is to be told that a law says this or that and then the reader is left to find the text in some ponderous volume!

Dr. Blais has gone to considerable trouble to construct a satisfactory index. His bibliography is impressive and reveals a serious effort to be informed of every item, medical and theological, which might aid in the discussion of eugenic tendencies in Canada.

EDWARD ROELKER

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Announcement has been noted of the appearance of a new annual periodical, *Traditio*—Studies in Ancient and Medieval History, Thought and Religion. It should be welcomed by all scholars and learned institutions as a medium for the presentation of rather extensive and profound articles based on ancient and medieval research. Studies in the first volume are announced as taken from the fields of classical and Christian antiquity, of liturgy and law, of patrology, Scholasticism, Canonical jurisprudence and political theory. Its editors are Johannes Quasten, Professor of Ancient Church History, and Stephan Kuttner, Professor of the History of Canon Law, both of The Catholic University of America. The publisher is Cosmopolitan Science & Art Service Co., Inc., 638 Lexington Avenue, New York. The stipend is $5.75.

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Copies of Volume I, number 1, of THE JURIST are in demand. Libraries especially are in need of this number. THE JURIST will be pleased to exchange any other number in return for this one; or to apply one dollar to the subscription account of its benefactor.

Chronicle

GENERAL

On January 17, the annual "Red Mass" was celebrated in the Shrine of the Immaculate Conception on the campus of The Catholic University of America under the auspices of the School of Law by Rt. Rev. Msgr. Edward B. Jordan, Dean of the Sisters' College. Very Rev. Ignatius Smith, O.P., Dean of the School of Philosophy, preached on "The Sanctity of the Law". The Vice President of the United States and Justice Murphy were among the notable persons in attendance.

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A Catholic Collegiate Congress was held in Cincinnati December 27-30, under the auspices of the National Federation of Catholic College Students and the Newman Club Federation. Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago and Chairman of the Bishops' Committee on the Pope's Peace Points addressed the Congress on December 29 on "The Peace of Christ".

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The National Catholic Welfare Conference has set up a department known as War Relief Services with Rt. Rev. Msgr. Bryan J. McEntegart as director. It is distinct from the Bishops' War Emergency and Relief Committee and will commence a program looking towards cooperation with governmental agencies for post-war relief.

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At the 23rd annual meeting of the American Catholic Historical Association held in Washington, D. C., Richard F. Pattee, Assistant Chief of the Division of Cultural Relations, U. S. Department of State, was elected president.

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The first annual meeting of the Catholic Economic Association to have been held in Cleveland December 28-29 was postponed. Rev. Thomas F. Divine, S.J., of Marquette University, was elected president by mail.

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The Society for the Propagation of the Faith has organized an advisory committee for the "Academia for the Study of the Missions", which is a six-year course of eight lectures a year given in the seminaries of the country. A quarterly bulletin, *Academia Mission Notes,* will be sent the students.

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Most Rev. John M. Gannon, D.D., Bishop of Erie, attended as representative of the Hierarchy of the United States the consecration of Most Rev. Fortino Gomez, D.D., Archbishop of Oaxaca, by Most Rev. Guillermo Tritschler, Archbishop of Monterey. The sermon was preached by the Most Rev. Apostolic Delegate to Mexico, Archbishop Martinez.

Most Rev. Mariano S. Garriga, D.D., Coadjutor Bishop of Corpus Christi, represented the Hierarchy of the United States at Eucharistic Congresses in Yucatan, Mexico, and San Salvador, Republic of Salvador.

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The Fifth Annual Conference on Oriental Rites and Liturgies, sponsored by Fordham University, will be held at the University, April 2-3, with Mass at St. Patrick's Cathedral on April 3. The subject will be the Melkite Rite.

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On April 25, the Archdiocese of New Orleans will observe its sesquicentennial; it was established when Louisiana belonged to Spain under Bishop Don Luis Ignacio Penalver y Cardenas, who in 1801 was made Archbishop of Guatemala. His successor, though consecrated in Rome, never came to the See because Louisiana was handed over to France, but was transferred to a See in Spain. Bishop Carroll assumed jurisdiction on September 20, 1805, in virtue of a letter from the Sacred Congregation for the Propagation of the Faith and appointed Rev. John Olivier as Vicar General. In 1812 Rev. William Dubourg, S.S., was named Apostolic Administrator and was consecrated Bishop of Louisiana at Rome on September 24, 1815, though he did not take up his residence there until 1823. He resigned three years later. In July 1850 the See was raised to the rank of an Archdiocese under Archbishop Antoine Blanc.

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Most Rev. John J. Cantwell, D.D., Archbishop of Los Angeles, observed the silver jubilee of his episcopal consecration of December 6.

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Most Rev. Emmanuel B. Ledvina, D.D., Bishop of Corpus Christi, observed the fiftieth anniversary of his ordination on March 18. He was consecrated Bishop June 14, 1921. He has been an Assistant at the Pontifical Throne since 1931.

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Most Rev. Stephen S. Woznicki has celebrated the silver jubilee of his ordination.

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50 years ago Rt. Rev. Msgr. Eugene Satolli was appointed first Apostolic Delegate to the United States.

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Sunday, February 21, was observed as Biblical Sunday, commemorating this year the fiftieth anniversary of the great Biblical Encyclical of Pope Leo XIII, *Providentissimus Deus*.

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100 years ago Pope Leo XIII was consecrated Archbishop; 65 years ago he was elected Pope.

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75 years ago, approving the recommendations of the II Plenary Council of Baltimore (1866) the Holy See announced the erection of eight new dioceses and four apostolic vicariates: Columbus, Rochester, Wilmington, Scranton, Harrisburg, Green Bay, La Crosse, St. Joseph, and the vicariates of North Caro-

lina, Idaho, Colorado, and Montana. The seventy-fifth anniversary of the founding of the Diocese of Columbus was observed on February 28th (March 3 is the exact date of founding).

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On March 2, Most Rev. Rudolph A. Gerken, D.D., Archbishop of Santa Fe, died, at the age of fifty-six, from a cerebral thrombosis. Most Rev. Urban J. Vehr, D.D., Archbishop of Denver, celebrated the Pontifical Mass of Requiem. Most Rev. Joseph P. Lynch, D.D., Bishop of Dallas, preached the English sermon and Most Rev. Sidney M. Metzger, D.D., Coadjutor Bishop of El Paso, the Spanish sermon. The remains were interred in the last vacant crypt beneath the Cathedral, where Archbishop Lamy, the first Archbishop of the See, is buried.

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Rt. Rev. Msgr. George J. Waring, Vicar General and Chancellor of the Catholic chaplains of the United States armed forces from 1918 to 1938, died in New York at the age of 71. A Pontifical Mass of Requiem was celebrated by Most Rev. Stephen J. Donahue, D.D., Auxiliary Bishop of New York.

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Arthur Cardinal Hinsley, Archbishop of Westminster, died March 16. at the age of 77. He had been Archbishop since 1935 and Cardinal since 1937.

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On December 13, Very Rev. Vladimir Ledochowski, General of the Society of Jesus, died in Rome.

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Most Rev. Fabian Zoel Decalles, Bishop of St. Hyacinthe, Province of Quebec, died in December at the age of seventy-three and was succeeded by his Coadjutor, Most Rev. Arthur Douville.

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Most Rev. William T. Finneman, S.V.D., Bishop of Sora and Prefect Apostolic of Mindoro, Philippine Islands, died on Manila on Christmas Eve.

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Most Rev. Vincente Maria Camacho y Mora, Bishop of Tabasco, Mexico, died February 18th, at the age of fifty-six.

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25 years ago Archbishop Edmund F. Prendergast of Philadelphia died at the age of seventy-five.

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Most Rev. Arsene Turquetil, O.M.I., Titular Bishop of Ptolemais and Vicar Apostolic of Hudson Bay, has resigned, after forty-two years of service in the North and is succeeded by Bishop Marc Lacroix, O.M.I.

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Most Rev. Maurice Despatures, Bishop of Bangalore, India, since 1940, has resigned. He was previously Bishop of Mysore, to which See he was appointed in 1922.

DIGNITIES

On December 21, Most Rev. Leo Binz, D.D., was consecrated Titular Bishop of Pinara and Coadjutor Bishop of Winona in the Pro-Cathedral of St. James, Rockford, Illinois, by His Excellency, the Most Rev. Apostolic Delegate. The co-consecrators were Most Rev. Edward F. Hoban, D.D., Coadjutor Bishop of Cleveland, and Most Rev. Henry P. Rohlman, D.D., Bishop of Davenport. Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, preached the sermon.

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On January 21, Most Rev. Edward F. Hoban, D.D., was installed as Coadjutor Bishop of Cleveland in St. John's Cathedral.

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On January 27, Most Rev. Martin J. O'Connor, D.D., was consecrated Titular Bishop of Thespiae and Auxiliary Bishop of Scranton, by Most Rev. William J. Hafey, D.D., Bishop of Scranton. The co-consecrators were Most Rev. George L. Leech, D.D., Bishop of Harrisburg, and Most Rev. Gerald P. O'Hara, D.D., Bishop of Savannah-Atlanta. Rt. Rev. Msgr. Fulton J. Sheen preached.

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On January 28, Most Rev. William T. McCarty, C.Ss.R., newly appointed Military Delegate, was consecrated Titular Bishop of Anea in St. Patrick's Cathedral, New York, by Most Rev. Francis J. Spellman, D.D., Archbishop of New York and Military Vicar. The co-consecrators were Most Rev. Thomas E. Molloy, D.D., Bishop of Brooklyn, and Most Rev. John F. O'Hara, C.S.C., also a Military Delegate. The sermon was preached by Most Rev. Gerald C. Murray, C.Ss.R., Bishop of Saskatoon.

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On February 17, Most Rev. John J. Boylan, D.D., was consecrated Bishop of Rockford, in St. Ambrose's Cathedral, Des Moines, by Most Rev. Gerald T. Bergan, D.D., Bishop of Des Moines. The co-consecrators were Most Rev. Henry P. Rohlman, D.D., Bishop of Davenport, and Most Rev. Edmond Heelan, D.D., Bishop of Sioux City. The sermon was preached by Most Rev. Francis J. L. Beckman, D.D., Archbishop of Dubuque.

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Most Rev. Edward Mooney, D.D., Archbishop of Detroit and Chairman of the Administrative Board of the National Catholic Welfare Conference, has been appointed a member of the Board of Incorporators of the American Red Cross.

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Most Rev. A. J. Danglmayr, D.D., Auxiliary Bishop of Dallas, has been appointed a member of the War Labor Board Advisory Council for the South.

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Rt. Rev. Msgr. Edward J. Leinheuser was appointed rector of St. Charles' Seminary, Columbus, Ohio, succeeding Rt. Rev. Msgr. Joseph A. Weigand, who died in October.

Rev. Thomas J. Feeney, J.C.D., succeeds Very Rev. Msgr. J. D. Conway, as Chancellor of the Diocese of Davenport.

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Rt. Rev. Msgr. Dennis E. Malone, Vicar General of the Diocese of Grand Rapids, was made a Protonotary Apostolic.

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Rt. Rev. George Johnson has been promoted to the rank of Domestic Prelate. He is Director of the Department of Education, National Catholic Welfare Conference, Secretary of the National Catholic Educational Association, and associate professor of education at The Catholic University of America.

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The following priests of the Diocese of Buffalo have been advanced to the rank of Domestic Prelate: Very Revs. John E. Mullett, V.F., John J. Sheehy, V.F., and John A. Weismantel, V.F., and Revs. Peter Adamski, Joseph A. Burke, Joseph J. Glapinski, Michael F. Helminiak, Henry B. Laudenbach, Joseph E. Maguire, Edmund J. O'Connor, Francis A. Radziszewski, Albert Rung, Joseph Schemel, Luke F. Sharkey, Paschal J. Tronolone. Promotion to the title of Very Rev. Monsignor was given to Revs. Leo R. Smith, Assistant Chancellor, and Raymond Curtin, Vice Chancellor.

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Three priests of the Archdiocese of Denver have been raised to the rank of Domestic Prelate: Very Rev. John R. Mulroy, and Revs. W. M. Higgins and Charles M. Hagus.

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The following priests of the Diocese of Hartford have been promoted to the rank of Domestic Prelate: Revs. William J. Blake, John L. Ceppa, William J. Fanning, and John F. Moore.

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The following priests of the Diocese of Rapid City have been elevated to the rank of Domestic Prelate: Revs. M. S. Roach, M. T. Costigan, W. A. Sobolewski, and Henry H. Kipp.

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Rev. Walter S. Carroll, S.T.D., J.C.D., priest of the Diocese of Pittsburgh on duty at the Secretariate of State, has been made a Papal Chamberlain.

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Very Revs. Constantine S. Pettigrew, John E. Kuhn and Clarence G. Issenman, of the Archdiocese of Cincinnati, were recently appointed Papal Chamberlains.

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Rev. Georges Leon Pelletier, professor of Theology and Sacred Scripture in Laval University, has been named Titular Bishop of Ephesus and second Auxiliary to His Eminence, Cardinal Rodrigue Villeneuve, Archbishop of Quebec.

Rt. Rev. Msgr. Fortino Gomez has been named Archbishop of Oaxaca, Mexico, succeeding the late Archbishop Jose Nunez y Zarate.

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Rt. Rev. Msgr. Alonso Escalante, M.M., is named Vicar Apostolic of Pando in Bolivia.

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Rev. Gregory Alonso, an Augustinian Recollect, is named Titular Bishop of Pogla and Prelate *Nullius* of Morajo, Brazil. Rev. Fernando Gomes dos Santos has been named Bishop of Penedo, Brazil.

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Rev. John Gay, C.S.Sp., Secretary General of his community, has been named Titular Bishop of Ezani and Coadjutor to Most Rev. Pierre Genoud, C.S.Sp., Bishop of Guadeloupe in the Antilles.

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Rt. Rev. Msgr. Eugene O'Callaghan, Vicar General of the Archdiocese of Armagh, is named Bishop of Clogher, Ireland. Rev. Daniel Cohalan is named Bishop of Waterford and Lismore.

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Rt. Rev. George Jacquin, Vicar General of Dijon, France, has been named Bishop of Moulins.

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Rev. Julius Glattfelder, Bishop of Csanad, Hungary, has been elevated to the Metropolitan See of Kalocsa. Canon Joseph Peteri has been made Bishop of Vacz.

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Bishop Gregorio Modrego Casaus, Apostolic Administrator of Cuenca, Spain, has been named Bishop of Barcelona; Bishop Francisco Barbado Viejo has been transferred from the See of Coria to that of Salamanca; Canon Rafael Garcia y Garcia de Castro has been made Bishop of Jaen; Rev. Ramon Navarri, Secretary of the Military Ordinariate, Bishop of Urgal; and Rev. Emetrio Barrena, Vicar General of the Diocese of Pamplona, Titular Bishop of Dora. Rev. Emanuel Hurtado Garcia has been named Titular Bishop of Bilta and Auxiliary of Granada. Rt. Rev. Msgr. Casimir Morcillo, Vicar General of the Diocese of Madrid, has been named Titular Bishop of Agatopoli and Auxiliary Bishop of Madrid.

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Most Rev. Frederick A. Donaghy, M.M., Vicar Apostolic of Wuchow, China, has consecrated Bishop Romalho for the Diocese of Macao.

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At its mid-year commencement Georgetown University conferred honorary degrees on Lt. Gen. Hugh A. Drum, commanding general of the first army and the second service command, Governors Island; Rear Admiral William Brent Young, paymaster and chief of the bureau of supplies and accounts; and John J. McShane.

On January 5, Most Rev. Francis J. Spellman, D.D., Archbishop of New York, presented to Joseph F. Lamb, Supreme Secretary of the Knights of Columbus, the insignia of Knight Commander of the Order of St. Gregory the Great.

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On January 24, the Christian Culture Award medal, was bestowed in Windsor, Province of Ontario, on Philip Murray, president of the C.I.O.

THE CANON LAW SOCIETY OF AMERICA

At the fourth annual meeting of the Canon Law Society of America in New York City on November 15, 1942, the newly elected President of the Society, the Rev. James P. Kelly, J.C.D., expressed the hope that early in the year 1943 a regional meeting could be held in New York City for the purpose of exploring and discussing some leading canonical topic of practical import. This hope came to fulfilment on January 14, 1943, when the Rev. Francis J. Reh, J.C.D., of Saint Joseph's Seminary, Yonkers, N. Y., led a discussion on a recent reply of the Pontifical Commission for the Interpretation of the Code which deals with the question of right, on the side of guilty parties, judicially to impugn the validity of their marriage.

The meeting, at which were present between fifty and sixty members from the ecclesiastical provinces of Boston, New York and Philadelphia, was held at the Hotel Biltmore. The Rev. James P. Kelly, J.C.D., President of the Society, presided at the meeting. The assembly felt particularly honored with the presence of His Excellency, The Most Reverend Raymond A. Kearney, Auxiliary Bishop of Brooklyn, and the attendance of the Rt. Rev. Monsignor Michael J. Spaine, *Officialis* of the Archdiocese of Boston, and the Rt. Rev. Monsignor George P. Johnson, Vicar General of the Diocese of Portland.

On July 27, 1942, the Pontifical Commission gave a reply to the following query: "Utrum, secundum canonem 1971, § 1 1° et responsum diei 17 iulii 1933 ad II, inhabilis ad accusandum matrimonium habendus sit tantum coniux, qui sive impedimenti sive nullitatis matrimonii causa fuit et directa et dolosa, an etiam coniux qui impedimenti vel nullitatis matrimonii causa exstitit vel indirecta vel doli expers." (Cf. THE JURIST, III [1943] 156.) The reply was in the affirmative to the first section of the query, but in the negative to the second. This official interpretation of canon 1971, § 1, 1°, constituted the basis for the discussion at the meeting.

Disclaiming all other than personal responsibility for the doctrine he presented, Father Reh, after crystallizing the meaning of the various words employed in the official reply, held that any person who was the *causa impedimenti vel nullitatis matrimonii* in any other way than through a combination both of direct action and of deliberative intent would not be barred from presenting to an ecclesiastical court his plea regarding the nullity of his marriage. His doctrine found general acceptance with his audience in the extended discussion which followed from the floor.

With the conclusion of the meeting the assembled members gave expression to the desire that a similar meeting might be held during the coming spring. The Committee of Arrangements hopes to make possible the holding of this meeting at a time when it can serve to commemorate, at least by approximate date, the silver jubilee of the advent of the Code on May 19, 1943.

With Monsignor Lawrence J. Shehan, Pastor of Saint Patrick's Church, Washington, D. C., as host to the members, there convened on February 11, 1943, a regional meeting at which there was treated the same topic which a month earlier had been discussed in New York. Members of the Canon Law Society from throughout the ecclesiastical province of Baltimore-Washington had been invited. In view of the attendance of the priest student body enrolled in the School of Canon Law at The Catholic University of America the number present at the meeting reached a high total of 90. Besides the Faculty of the School of Canon Law there were in attendance also the Rev. James P. Kelly, J.C.D., President of the Society, and the Very Rev. Eugene A. Dooley, O.M.I., J.C.D., Vice-President. The Rev. Clement Bastnagel, J.U.D., Chairman of the Committee of Arrangements, acted also as chairman of the meeting. The Rev. Francis P. Kearney, J.C.D., of Mount Saint Mary's Seminary, Emmitsburg, Md., led the discussion with a paper in which by way of introduction he admirably delineated the various juridical factors which in antecedent legislation prepared the way for the discipline which now obtains. The ensuing open discussion considerably clarified a number of points concerning which the question of a practical outline of procedure was raised. Before adjournment the assembled group indicated its desire that another meeting be held around the middle of May for the purpose of suitably commemorating the 25th anniversary of the present law of the Code.

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For the ecclesiastical province of Saint Louis the Very Rev. John P. Cody, Ph.D., S.T.D., J.C.D., Chancellor of the Archdiocese of Saint Louis, is at present perfecting plans for the early holding of a regional meeting of the Canon Law Society members after Easter. In this particular kind of activity Saint Louis is but carrying on with a tradition which already is firmly entrenched.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

1. a. Date: December 14, 1942.

b. Title: Adoption in Roman Law.

c. Author: Dr. Roscoe J. C. Dorsey, Professor of Jurisprudence at the Washington College of Law.

d. Abstract:

Dr. Dorsey traced the practice of adoption from the legal and religious records of pristine days that pertain to several ethnic ingredients that compose the human family, to the era of the Emperor Justinian.

The pre-Roman era comprehends the status of adoption pertaining to the Semitic, Mongolian, Hamitic, and Aryan, ethnic groups: more particularly the Babylonians, Assyrians, Hebrews, Chinese, Japanese, Hittites, Egyptians, Hindus, Iranians, Greeks, Celts, Slavs, and Teutons. In most of these, adoptions were known; in a few the practice apparently was unknown. Ancestor worship, veneration of the dead, and the sacred fire were important correlative factors.

The Roman era dates from the foundation of Rome to the time of Justinian. Adrogation and adoption developed into important subjects in their system of jurisprudence. The *Comitia Curiata* and the *Pontifices* were neces-

sary factors. *Patria Potestas* was severed and created. Persons *sui juris* and *alieni juris* and their property came within the scope of the subject. Under this artificial creation of family life, women, *pubes, impubes,* and the unmarried had special rules applicable to them. From the days of the *Ius Civile* to those of Gaius and finally to the time of Justinian, Roman law reflected changes in the law of adoption and adrogation.

Our law did not receive its adoption principles from the Common Law of England, for that great system did not know adoption, but rather from a greater system, namely, the Roman Law.

1. a. Date: January 28, 1943.

b. Title: Polish Jurists and Polish Law in Their Attitude toward Roman Law from the Fourteenth to the Eighteenth Century.

c. Author: Dr. Vladimir Gsovski, Special Assistant for Foreign Law to the Law Librarian, Library of Congress.

d. Abstract:

Dr. Gsovski described the controversy among the Polish jurists of the Sixteenth Century over the authority of Roman Law in Poland and its political background, e.g., in the resistance of Polish nobility to absolutism and in the litigation between the Polish kings and the Knights of the Teutonic Order. He gave data on the diffusion of Romanistic learning in Medieval Poland and on the effect of Roman Law in the formation of Polish legal sources (the Polish common law, the gentry law, the municipal law, the Russo-Lithuanian law), in court decisions, and in legal documents. He summarized the discussions of modern Polish scholars about the role of Roman law in the legal history of their country before the end of its independence in the late Eighteenth Century.

2. a. Date: February 24, 1943.

b. Title: Legal Business in the Byzantine Empire: A Chartulary of the Thirteenth Century.

c. Author: Dr. Paul J. Alexander, Junior Fellow of Dumbarton Oaks Research Library and Collection of Harvard University in Washington, D. C.

d. Abstracts: Dr. Alexander based his lecture on and illustrated it by a thorough inquiry into a medieval chartulary referring to two monasteries in Thessaly, Greece. The contents of the manuscript as well as its history were described. An attempt was made to place the chartulary against its proper historical background. The individual documents (imperial, patriarchal, private) were examined from the point of view of the legal historian. The speaker concluded by discussing the forces of feudalism which led to the disintegration of the Medieval Roman Empire of the East.

The Concilium for 1942-1943 consists of the following:

Dr. Stephen G. Kuttner, *Magister*
Dr. Brendan F. Brown, *Scriba*
Dr. Vladimir Gsovski
Dr. Walter L. Moll
Dr. Robert J. White
Dr. Francis G. Lardone